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THE UNIVERSITY OF ALBERTA

THE LEGAL STATUS OF THE CANADIAN TEACHER

by

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies for acceptance, a thesis entitled "The Legal Status of the Canadian Teacher" submitted by Sherburne G. McCurdy in partial fulfilment of the requirements for the degree of Doctor of Philosophy.

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ABSTRACT

Legal status is defined as the standing of a person before the law in the class of persons indicated by his or her legal qualities. The chief object of the present study has been to examine the legal environment in which the Canadian school teacher practises his profession and to derive from such an examination a statement of his legal status. Since the primary repositories of legal status comprise the statutes and subordinate legislation, case law, common law, and the quasi-judicial process, an attempt has been made to assess the contributions of each of these areas of the law to the teacher's legal status. Pertinent statutes of the Parliament of Canada and of the provincial legislatures have been examined, along with a substantial number of reports of actions which have been brought before the courts. From these, a number of principles have been derived. It was found that while the number of cases is relatively small, their significance continues to be great. This significance derives in part from the power of review and supervision which the courts exercise over quasi-judicial procedures.

It was hypothesised that quasi-judicial bodies increasingly shape the legal status of the teacher. This hypothesis has been in part substantiated, inasmuch as arbitration boards, boards of reference, and discipline committees adjudicate many disputes between teachers and their employers, their colleagues, the professional organization, or the public. As the study developed, however, it became apparent to the writer that teacher organizations and school boards alike tend to prefer resolving disputes by means even less formal than those envisaged

by legislation establishing quasi-judicial processes.

This tendency for large and powerful organizations to negotiate informally to settle problems concerning individuals should be a matter of concern to the individual teacher. The increasing emphasis being placed upon the institution of education, the size of large urban school systems, and the rapid growth of the professional organizations, all raise the question as to whether or not the position of the teacher as an individual is being eroded. The findings of this study offer no grounds for complacency in this regard.

It has also been found, however, that in provinces where the professional organization is strong and vigorous, the legislation concerning the teacher's rights, duties, privileges, and responsibilities tends to be more clearly spelled out, and the legal status of the teacher more firmly established than in areas where the united voice of professional teachers remains silent, unheard, or unheeded.

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CHAPTER I

INTRODUCTION

I. STATUS OF TEACHERS

Professional Status

At the recent Canadian Conference on Education a great deal of time was devoted to an examination of the professional status of teachers. In a booklet prepared for one of the forums of this Conference a number of criteria were listed as being characteristics of a professional person. Four of these characteristics endorsed by the Conference are:¹

1. Specialized Knowledge and Skill: He has intellectual competence and superior skill to a degree unmatched by the layman in a field normally unfamiliar to most laymen.

2. Service to Others Paramount: The welfare of client or patient is his first consideration. He gives his full time and thought to the practice of his profession.

3. Autonomy and Independence: He is self reliant, requiring little or no close supervision in his work. He has such integrity and pride in his work that he is largely self-motivating. His work is not measured in time units. Its quality means more to him than the financial rewards it brings.

4. A Scholarly Inquiring Attitude: He is a well educated person, an intellectual type whose professional preparation 'has included at least a taste of higher learning.' He remains intellectually curious and engages in a continuing search for new knowledge and skill.

Two additional criteria were accorded less than unanimous support:²

1. Membership in a Professional Organization: He participates in (or supports) the work of an organized group of professional

¹James M. Paton, The Professional Status of Teachers, Conference Study #2, Canadian Conference on Education, 1962, pp. 6, 7.

²Ibid.

colleagues which assumes responsibility for attaining and maintaining high standards of admission to, and of competence and ethical behavior in the practice of, his chosen profession.

2. Status in the Community: He is accepted in the community (local, provincial, or national) as one who is well above average in intellectual attainment, in his contribution (potential or actual) to the well being of society, and probably in his economic status.

Commenting on these, Paton concludes that "the prestige of the teacher will be low in proportion as his academic preparation is meagre, his scholarship weak or non-existent, and his acceptance of an ill paid, humble, and essentially negative role in the community obvious."³

In discussing the difficulty of arriving at an acceptable definition of a profession, Cogan made the following point:⁴

In the case of those who consider definition impossible or even undesirable, the impracticability of defining seems to derive from an inability to measure the degree in which traits must be present for profession to exist, rather than from the impossibility of identifying those traits.

He then proceeded to offer a tentative definition.⁵

A profession is a vocation whose practice is founded upon an understanding of the theoretical structure of some department of learning or science, and upon the abilities accompanying such understanding. This understanding and these abilities are applied to the vital practical affairs of man. The practices of the profession are modified by knowledge of a generalized nature and by the accumulated wisdom and experience of mankind, which serve to correct the errors of specialism. The profession, serving the vital needs of man, considers its first ethical imperative to be altruistic service to the client.

³Ibid.

⁴Morris L. Cogan, "Toward a Definition of Profession," Harvard Educational Review, Vol. 23, #1, 1953, p.47.

⁵Ibid., pp. 50, 51.

A prominent Canadian teacher and former officer of both the Ontario and Canadian Teachers' Federations, addressing himself to the business community through the medium of the Imperial Oil Review, spoke bluntly of the teachers' status.⁶

For a long time we have been buying our educational and professional services as cheaply as possible. As a result, the teacher in many areas today is regarded as a sort of second class citizen. . . . Many school boards, for their part, regard teachers as hired hands. . . . School inspectors and supervisors, for their part, tend to over-supervise even experienced teachers; to check and cross check, scrutinize and advocate . . . Partly because of these situations--and also because the teacher by nature is an introspective person--teachers do not respect themselves.

There are many who would not share Mr. Roberts' views in toto. There is ample evidence of increasing teacher influence upon curriculum development, upon legislation, and upon school board policy. As an example, the Alberta Teachers' Association is represented on no fewer than twenty-seven external committees, among whose concerns are curriculum at all levels, certification of teachers, accreditation, legislation and in-service education. Through these committees teachers are establishing working contact with Department of Education officials, politicians, school trustees, university personnel, and the general public.⁷

Legal Status

While both teachers and laymen have been debating the professional and social status of teachers, recent studies respecting the legal status of the school pupil and school board have focussed attention on yet

⁶George R. Roberts, "What's Wrong With Our Teachers," Imperial Oil Review, Vol. 43, #4 (September, 1959), pp. 2-5.

⁷The A.T.A. Handbook, 1963, p. 262.

another repository of status, that status which derives from the law of the land.

Most teachers are aware that the law prescribes certain duties for them, that school boards have authority over them, and that their professional organizations are acquiring a measure of influence over their station in the educational world. It is doubtful, however, if teachers generally realize the extent to which the legislation determines their rights, duties, powers, privileges and responsibilities. Nor would many be aware of the interpretations given to this legislation by the courts. Perhaps even less would they realize the increasingly important influence that various administrative or quasi-judicial bodies are having on their legal status. An interest in this legal aspect of the teacher's working environment has led the writer to embark on an investigation of the legal status of the Canadian teacher.

II. PURPOSE OF THE STUDY

One of the major components of the milieu in which a teacher operates is legal in nature and it bears on his relations with his employers, his colleagues and his pupils. The chief purpose of this study is to determine the nature of these relationships and so to discover, in broad terms, the legal status of the Canadian teacher.

A second purpose is to attempt to determine whether or not the increasing emphasis being placed on the institution of education and upon the profession as an organization is eroding the teacher's position as an individual.

III. NEED FOR THE STUDY

One justification for a study of the legal status of the Canadian teacher is the ready acceptance by administrators and educators of studies recently completed in related fields. Already the studies of Lamb, Borgen, and Enns have become text books or references in teacher education institutions and are increasingly relied upon by administrators and school board officials to guide them more effectively through the legal complexities of modern education. It is felt by the writer that further service to those involved in education could be rendered through examining the legal environment of the teacher. Most of all it is felt that the teacher himself should become more aware of his duties, his rights, his powers and his privileges, and more conscious of the trends that are shaping his legal status and thus influencing the manner in which he is able to practise his profession.

Finally, the writer believes that the increasing influence of the quasi-judicial body and the growth in power and importance of the teacher organization have great significance for the legal status of the teacher.

IV. SOURCES OF INFORMATION

The chief sources of information for this study were the law reports summarized in the Canadian Abridgement and given in full in the Law Reports of the Supreme Court of Canada and in the reports of the various provincial courts. Slightly more than one hundred

Canadian cases bearing directly on the legal status of the teacher were found in these reports. This relatively small number of cases suggested the advisability of moving beyond litigation to discover the complete legal environment in which the teacher operates. The statutes of the provinces, together with departmental regulations, were available either in the Law Library or through the courtesy of the Departments of Education across Canada. A further source of information was the constitution and by-laws of teacher organizations, usually found in the handbooks published for members of the professional organization in each province.

Finally, personnel of teacher organizations were available for interview, and where necessary, the records of these organizations were examined.

V. METHOD USED

The study of the teacher's legal status is organized under a number of major headings. These include certification, appointment to a teaching position, security of tenure, authority and powers, liability for damages in school accidents, salary negotiation procedures and professional conduct. Under each heading the statutes are examined to determine whether or not common threads run through the provisions made by the legislatures of the provinces regarding the topic being examined. Summaries, comparisons and contrasts are made where this was deemed necessary. In addition to analysis of the statutes, cases are examined for judicial interpretation of these statutes. In instances where no

judicial interpretation of important points of law has been rendered by Canadian Courts, reference is made to judgments handed down in British or American courts.

A study is made of the powers and functions of the various quasi-judicial bodies which exist in most provinces to deal with matters in dispute between teachers and their employers. This portion of the study also includes a close examination of the discipline or professional committees within the teacher organizations to discover the extent to which the legal status of the individual teacher is determined by such bodies.

Under each major heading a concluding statement is given in an attempt to summarize and clarify the legal position of the teacher in the particular area under discussion.

VI. HYPOTHESES

While to a major extent the legal status of the Canadian teacher is still founded in legislation and in judicial interpretation of that legislation, it is the writer's hypothesis that quasi-judicial bodies are increasingly shaping and influencing that status. Boards of Reference, set up to hear disputes over tenure and contract, Arbitration and Conciliation Boards dealing with differences over salary, Discipline or Professional Committees of teacher organizations passing on matters of professional conduct, and not least, the teacher organizations themselves, possessing as they do substantial legal power over their members, all exert influence and all help shape the legal environment

in which the teacher practises his profession. Nor may the persuasive power of the teacher organizations be overlooked. Teacher organizations increasingly act as advisors and mentors of their individual members and in so doing influence the manner in which those members react to legal questions and situations.

It is also hypothesized that the legal status of the teacher is more clearly defined in some regions of Canada than in others.

VII. DELIMITATIONS OF THE STUDY

1) Only insofar as it bears directly on the legal status of the teacher is reference made to the legal status of the pupil or school board.

2) Reference is made to English and American cases on significant points of case law not covered by Canadian court decisions but this does not mean that a comprehensive survey of English and American school litigation has been made.

3) No attempt is made to examine in detail the proceedings of the quasi-judicial bodies set up to deal with disputes or matters of discipline. For the purposes of this study, the writer is more concerned with the nature of these bodies and with their legal powers, than with the findings, decisions, or recommendations arrived at. Moreover, inasmuch as such findings, decisions or recommendations do not constitute legal precedents to govern subsequent hearings, it is unnecessary to dwell upon them at length.

4) This study is not primarily concerned with the legal status

of the university teacher, nor with the legal status of the teacher in the private school. Rather it is concerned with teachers of elementary and secondary schools, both public and separate. Only where it seemed to shed light upon the legal status of the public school teacher has reference been made to the position of the university teacher.

VIII. RELATED STUDIES

Canadian Studies:

Ross, G.J. - The Courts and the Canadian Public Schools. Microfilmed Doctoral Dissertation, University of Chicago, 1948.

The table of contents of this study reveals that it is broad in scope, touching as it does upon formation and boundaries of school districts, election and removal of trustees, board meetings, building contracts, tort liability of school districts and of individuals, teacher contracts, pupils, etc. A reading of this thesis reveals that it is something of a trail blazer, a starting-off point from which a number of studies might develop. Essentially, however, it is a school board oriented study based chiefly on an examination of court cases. In the author's own words "the object of this study is to gather together the court decisions binding on the eight provinces of Canada making use of the case law system, and to state in the language of the layman the general principles that have been applied to educational questions arising in the everyday business of a school district."⁹

⁹George J. Ross, "The Courts and the Canadian Public Schools," (microfilmed doctoral dissertation, University of Chicago, 1948).

Lamb, Robert L. - Legal Liability of School Boards and School Teachers for School Accidents. Research Study #3, Research Division of the Canadian Teachers' Federation, Ottawa, 1959.

This study, as the topic implies, is more specific than that of Ross, dealing in rather more depth with liability for damages of both teacher and board, liability for damages arising out of negligence, which Lamb indicates is "the breach of a duty to do or abstain from doing an act."¹⁰ In this study the point of origin is a legal principle.

Bargen, Peter F. - The Legal Status of the Canadian Public School Pupil. Toronto: The Macmillan Company of Canada Limited, 1961.

This is a study concerning status of a natural person, the Canadian Public School Pupil. Using the person as the point of origin, the author proceeds to examine that person's rights and responsibilities, and seeks to establish from court proceedings general common law principles respecting these rights and responsibilities. In so doing the author ranges rather widely into the area of school board and teacher status, coming back however to his main concern, the pupil, in each instance. A tribute to the general value of this study is found in the 1962 Yearbook of School Law where because of its content it is cited as "a valuable aid to all American administrators and board members."¹¹

¹⁰Robert L. Lamb, "Legal Liability of School Boards and School Teachers for School Accidents," Research Study #3, Research Division of the Canadian Teachers' Federation, Ottawa, 1959.

¹¹Leo O. Garber, Yearbook of School Law, 1962 (Danville, Illinois: The Interstate Printers and Publishers, Inc., 1962), p. 210.

Enns, Frederick - The Legal Status of the Canadian School Board.
Toronto: The Macmillan Company of Canada Limited, 1963.

In this study, again one of depth in a specific area, the author, in his own words, attempts "to derive from an examination of case law and the pertinent statutes such general principles as may assist school boards in their operations."¹² Once again this study uses a legal entity, this time the school board, as the point of departure, and the legal status of this body is adduced from general principles drawn from a comprehensive survey of the statutory provisions governing the school board, and of the court cases arising out of disputes.

An American Study

Dedrick, D. W. - Common Law Status of Teachers' Contracts of Employment.
Doctoral Dissertation, University of Connecticut, 1955.
(Microfilmed).

This is the only related study written by an American that has been closely examined. It is also the only one of the five mentioned here that was done by a lawyer. Dr. Dedrick has taken a penetrating look at contracts, and working from over one thousand court cases involving teacher contracts, has evolved a number of general principles regarding the common law. In addition to throwing light on a particular aspect of the teachers' legal status, this study was especially interesting and helpful in respect of format, assumptions, method of processing data, and the author's obvious familiarity with legal practice as well as legal theory.

¹²Frederick Enns, The Legal Status of the Canadian School Board,
(Toronto: The Macmillan Company of Canada Limited, 1963)

In summary, extensive reference to these related studies has proven most beneficial in terms of the light they shed on school law and also as both guide and inspiration to the writer as he embarks on a study in a closely related field.

IX. DEFINITION OF TERMS

The concepts defined below are in general terms only. The sources relied upon for these definitions are as follows:

1. H. C. Black, Black's Law Dictionary, 3rd Edition, 1933 (American).
2. Earl Jowitt, The Dictionary of English Law, 1959 (British).

Positive Law

Law actually and specifically enacted or adopted by proper authority for the government of an organized jural society. A 'law' in the sense in which that term is employed in jurisprudence is enforced by a sovereign political authority. It is thus distinguished not only from all rules, which like the principles of morality, and the so-called laws of honour and of fashion, are enforced by an indeterminate authority, but also from all rules enforced by a determinate authority which is either, on the one hand, superhuman, or on the other hand, politically subordinate. In order to emphasize the fact that 'laws' in the strict sense of the term are thus authoritatively imposed, they are described as positive laws.

Common Law

As distinguished from law created by the enactment of legislature

the common law comprises the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from the usages and customs of immemorial antiquity, or from the judgment and decrees of the courts recognizing, affirming, and enforcing such usages and customs, and, in this sense, particularly the ancient unwritten law of England.

Natural Justice

Natural justice comprises the rules to be followed by any person or body charged with the duty of adjudicating upon disputes between or upon the rights of others. The chief rules are to act fairly, in good faith, without bias, and in a judicial temper, and to give each party an opportunity of adequately stating his case.

Quasi-Judicial Function - Black (American)

A term applied to the action, discretion, etc. of public administrative officers who are required to investigate facts or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and to exercise discretion of a judicial nature.

Quasi-Judicial Function - Jowitt (English)

Functions akin to those of a judge, as those exercised by an arbitrator or an administrative tribunal. An inspector holding a public local inquiry must act judicially, but a Minister acting in his administrative capacity is not bound to act judicially.

In addition to the legal concepts outlined above, there is a

glossary of legal terms of a more technical nature included in the main body of the study.

Teacher

For the purposes of this study, a teacher is one who holds a valid teaching certificate issued by a department of education in one of the provinces of Canada. Where the legal status of the teacher is affected by designation to an administrative position such as the principalship, this is noted.

CHAPTER II

LEGAL CONCEPTS

I. INTRODUCTION

Before turning to the law as it applies particularly to teachers, some definitions of legal concepts and comments thereon are in order. The terms "written law" and "unwritten law", while perhaps unfamiliar to the layman, crop up repeatedly in legal literature and parlance, and require some explanation. Comments are offered also on case law, precedent and statutory construction.

As indicated in Chapter I, considerable emphasis is given in this study to the role of the quasi-judicial bodies which function in relation to teachers. The purpose at this stage is to discuss in general terms just what the quasi-judicial procedure is, and to attempt to assess its place in the legal framework in which teachers operate. Note is taken of the differing views which are held regarding the quasi-judicial process in Great Britain and in the United States. Finally, British, American, and Canadian court decisions are cited as examples of how the quasi-judicial process is viewed in the respective countries.

II. THE LAW AND THE COURTS

Sources of Law

English law has two major sources. They are (1) written or enacted law, and (2) unwritten or not enacted law. Written law may

take the form of original legislative enactments, such as Acts of Parliament or the legislature, and of delegated legislative authority, such as Orders-in-Council, by-laws and regulations of local bodies, etc. Quasi-judicial bodies set up by legislatures function under authority delegated by the legislature and thus their rules and regulations form part of the legal structure.

A distinction should be drawn between delegated and devolved authority. The latter consists of the kind of plenary authority which an act of the British Parliament confers upon the legislature of a self-governing member of the Commonwealth. The B.N.A. Act confers devolved authority upon the Parliament of Canada.¹

Unwritten or not enacted law comprises judicial and non-judicial expositions and declarations of law. The works of such respected authorities as Coke, Hale, and Blackstone are held in the highest regard and are commonly accepted virtually as law. "The decisions of superior courts of justice and the reasons assigned for them are judicial; books of authority and writings not of authority, but which help towards the formation of authority are non-judicial expositions and declarations of law."² Written law bears a political stamp and originates in legislatures or through delegated acts of legislation, while unwritten law is the work of judges deciding actual cases.

¹Rt. Hon. Sir Frederick Pollock, A First Book of Jurisprudence (London: Macmillan and Company Ltd., 1918), p.274 ff.

²Ibid., pp. 250,251.

A few leading "books of authority" are accepted as stating the law but most texts are merely persuasive.

While written law derives from the express will of the legislatures, unwritten law, while confined to judgments in modern times, derives partly from customs which Blackstone termed "general customs, which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification."³

While the sources of law are as outlined above, the forms in which a system of law may be stated are (1) command, (2) maxim or text, and (3) interpretation. Command is associated with written or enacted law, and is sometimes called imperative law, while maxim and interpretation relate to unwritten or discursive law. Interpretation has been defined as "the scientific process of applying legal rules in detail."⁴ A maxim is an established principle or proposition-- "a principle of law universally admitted as being a correct statement of the law, or as agreeable to reason."⁵

Closely associated with forms and sources of law outlined above is the concept of common law. Jowitt states that the common law consists of (1) what may be called the original common law, or those rules . . . which have been administered by the common law courts from

³Sir William Blackstone, Commentaries on the Laws of England, Book I (Philadelphia: Rees Welsh and Company, 1898), p. 67.

⁴Pollock, op.cit., p.233.

⁵Black's Law Dictionary.

education. Clauses of the Criminal Code of Canada pertain to education, indeed to the conduct of teachers throughout Canada.

Section 63 of the Code outlines the conditions under which teachers may use force as a means of correcting pupil behaviour in the schools.² Moreover, inasmuch as teachers in some provinces³ may be suspended or dismissed because of being found guilty of committing a criminal offence, it follows that the Code has significant bearing upon the teacher's legal status. The implications of these provisions are examined in greater detail under another heading in this study.⁴

Federal Government Departments

A third area in which federal legislation applies to education concerns those federal government departments which are directly involved in education programs. A number of departments are so involved.⁵ Examples are: The Department of Labor, which is responsible for an extensive program of technical and vocational education; the Department of Citizenship and Immigration, which is responsible for the education of Indian children as well as for assisting new Canadians with language difficulties; and the Department of National Defense, responsible for the education of children of servicemen overseas, as well as for military colleges. The Indian Act also contains

²Criminal Code of Canada, s.63.

³Education Act 1960, c.50 (Nfld.)

⁴Infra, Chapter VIII.

⁵Organization and Administration of Public Schools in Canada (1960). Dominion Bureau of Statistics, p.233 ff.

We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of Queen, lords and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but so long as it exists as law, the Courts are bound to obey it."⁹

There seems little doubt that the latter view forms the basis of modern practice.

Case Law. Case law, which is in fact judge made law, based on the doctrine of precedent, is concerned with the interpretation of constitutional and statute law. Constitutional interpretation is to determine whether points at issue are either ultra vires or intra vires the fundamental principles of the constitution itself.

The MacKell case brought forward by the Ottawa Separate School Board illustrates such a constitutional issue. Inasmuch as Section 93 of the British North America Act affords protection of the rights of minorities to denominational education, the Ottawa Board sought to link free use of the French language in separate schools to denominational rights. The court rejected the claim, declaring¹⁰

. . . the 'right of privilege' protected by law is not one concerning language, but to have what the general community has not, namely, religious instruction imparted in such schools.

Case law is also concerned with interpreting statute law other than that of a constitutional nature. In case of dispute between parties, the courts are called upon to determine whether or not the provisions of

⁹(1871) LR. 6 C.P. at 582.

¹⁰Bargen, op.cit., pp. 16,17.

the statutes are being observed. In making such interpretations the courts are guided by a number of rules, chief of which is that a statute is to be expounded "according to the interest of them that made it."¹¹

Nor are these rules applied solely to interpreting constitutional issues and other statutes of the realm. Hamilton and Mort refer to common law as "discovered" law in contrast to the enacted law of statutes and constitutions.

Certain customs became the accepted basis of proper conduct. These customs became crystallized into principles which in cases of controversy, were enunciated by the courts . . . The courts then tended to follow their earlier decisions and there came into being the doctrine of stare decisis, 'let the decision stand.'¹²

They go on to point out that

. . . the basic principles of contracts between a board of education and its teachers, the right of eminent domain, are not, normally, the result of any statutory or constitutional provision, but rather exist by virtue of what is known as the common law.¹³

Statutory Construction. The whole question of interpretation of statutory law is affected by the complexities of the language of the law. Thomas Jefferson, speaking of early Virginia acts, said that¹⁴

¹¹Roy Wilson and Brian Gulpin, Maxwell on the Interpretation of Statutes, 11th ed. (London: Sweet and Maxwell Ltd., 1962), p. 1.

¹²R. R. Hamilton and Paul R. Mort, The Law and Public Education (Brooklyn: The Foundation Press, Inc., 1959), p. 3 ff.

¹³Ibid.

¹⁴H.A. Washington (ed.). Jefferson, Autobiography; Writings of Thomas Jefferson, Vol.1, p.44 (Washington, D.C.: Taylor and Mawyr, 1853). Quoted by Remmlein, M.K., School Law. (New York: McGraw-Hill Book Company, Inc., 1950), p. 6.

. . . by their verbosity, their endless tautologies, their involutions of case within case, and parenthesis within parenthesis, and their multiplied efforts at certainty by 'saids' and 'aforesails' by 'ors' and 'ands', to make them more plain, they are really rendered more perplexed and incomprehensible, not only to common readers, but to lawyers themselves.

Bearing in mind the fact that modern school law suffers from many of these same ills, it may be useful to note some of the more basic rules of statutory construction. One of these rules is that the statute must be read as a whole; "the language of one section may effect the interpretation of another."¹⁵ Also, if a law contains both general and specific provisions, the specific will control the general. Similarly, under the principle of ejusdem generis, a series of particular words followed by a general term will limit the general term to the category particularized by the preceding specific words. Illustration may be found in many school laws regarding causes for dismissal of teachers; e.g. "immorality, incompetence, dishonesty, or other just cause." The general term "other just cause" would be interpreted as referring to causes in nature similar to immorality, incompetence, and dishonesty; that is, reasons derogatory to the teacher's reputation or professional capability.¹⁶

Yet another point of law may be of interest to the researcher, and most assuredly of vital interest to the teacher.¹⁷

It is a well established rule, of which teachers should be cognizant, that all pertinent provisions of the statutes are,

¹⁵Remmlein, loc. cit.

¹⁶Ibid., pp. 6, 7.

¹⁷Ibid., p. 476.

by implication, read into contracts of employment. Thus it was said by Mr. Justice Harris, speaking for the Supreme Court of Oregon:

"The contract of teaching is made with reference to the provisions of the statute, so that the contractual obligations of the teacher are not necessarily limited to the words found in the written statute, and therefore the contract of teaching includes not only the duties enumerated by the written paper, which for convenience is called the contract, but it also embraces those duties which are imposed under a then existing statute; and if the teacher breaches this contract of teaching, one of the ordinary legal remedies available to the school board, unless some statute declares to the contrary, would be found in the right summarily to discharge the teacher."

III. QUASI-JUDICIAL TRIBUNALS

The quasi-judicial procedure is a part of the apparatus of the law which exists to adjudicate and if possible to harmonize the relationship between the individual and authority. Traditionally it was left to the system of courts to perform this function. With the growth of government and government services, the points of contact and potential friction between government and the individual have multiplied to the point where legislatures have seen fit to create special tribunals to shoulder some of the courts' burden. Such tribunals vary widely in constitution, function, and procedure. This variation has led to a difference in emphasis, as between British and American authorities, as to just what a quasi-judicial body is.

British View of Quasi-Judicial Function. The British view is stated quite clearly in the Report of the Committee on Ministers' Powers, a Committee of Parliament set up to investigate the manner in which a Minister of the Crown exercises the administrative powers conferred upon

him by Parliament. In distinguishing between the judicial function and the quasi-judicial function, the report has this to say:¹⁸

The quasi-judicial function as conceived by the courts and by the committee - [sic] An administrative decision some state or element of which possesses judicial characteristics. It is not a judicial process from which one or more elements are missing, rather it is an administrative process to which one or more judicial elements are added.

The report continues:

A true judicial decision presupposes an existing dispute between two or more parties and then involves four requisites. They are:

- 1) the presentation, (not necessarily orally) of their case by the parties to the dispute;
- 2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of arguments by or on behalf of the parties on evidence;
- 3) if the dispute between them is a question of law, a submission of legal argument by the parties;
- 4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law.

A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves 1) and 2) above but does not necessarily involve 3) and never involves 4). The place of 4) is in fact taken by the administrative action the character of which is determined by the Minister's free choice.¹⁹

The general rule as to the quasi-judicial procedure is that it must satisfy the requirements of 'natural justice'. The whole

¹⁸ H.W.R.Wade, "Quasi-Judicial and its Background," The Cambridge Law Journal, 1950, Vol.X, No.2, p.227, citing Committee on Ministers' Powers Report, Cmd. 4060, p.73.

¹⁹ Ibid.

theory of 'natural justice' is that ministers, though free to decide as they like, will in practice decide properly and responsibly once the facts are laid before them.²⁰

It seems clear that in Britain the quasi-judicial tribunal which is set up to hear a dispute does not decide the issue; the quasi-judicial procedure is "a controlled fact-finding procedure, followed by an uncontrolled decision on policy."²¹ By contrast an arbitrator is regarded as "an eminently judicial functionary; he has no concern with executive policy, and his task is to find facts and dispense justice to the parties in an entirely objective manner."²² In summary, the British associate the judicial with the dispensing of justice, the quasi-judicial with the carrying out of policy.

American View of Quasi-Judicial Function. The American concept of the quasi-judicial function as outlined by Schwartz is substantially different.²³ The principle advocated in America is that the one who decides must hear. That is to say, if a person or a group of persons is called upon to make a decision that is essentially judicial in nature, such person or persons must first have been present to hear the facts and the evidence, and argument upon the facts. Citing the Federal Trade Commission and the National Labour Relations Board as the classic example of an American administrative tribunal exercising quasi-judicial functions, Schwartz notes that although the definition of the term is vague, it is

²⁰Wade, op.cit., p.229.

²¹Ibid.

²²Wade, op.cit., p.237, citing M.P.R. Cmd. 4060, p.73.

possible to explain the process in concrete terms.

The term describes the application by administrative officers of a broadly stated legislative policy to concrete cases by a procedure patterned after a court of law. Schwartz describes the Federal Trade Commission as "the administrative agency which affords the opportunity for hearing and renders the decision in these cases. The result is the merger in such agency of the functions of prosecutor and judge."²⁴ In all, such agencies as the Federal Trade Commission and the National Labor Relations Board perform a task comprising three elements: first, they determine what constitutes a violation of policy; second, they discover through the methods of a prosecutor that a person has violated the legislation; and third, they issue an order restraining the conduct thus found objectionable. "It is the agency concerned which initiates action against alleged violators, and judges whether in fact the alleged violation has occurred."²⁵ Compare this with the boards of inquiry set up by the British Ministry of Town and Country Planning. If a decision is to be made by the Minister as to whether or not a housing development project is to take place, or, as in Arlidge v. Local Government Board,²⁶ a decision is to be made as to whether or not a house is deemed to be habitable, an administrative tribunal or inquiry board is set up to conduct an inquiry and submit findings and recommendations to the

²³Bernard Schwartz, American Administrative Law (London: Sir Isaac Pitman and Sons, Ltd., 1954), p.60.

²⁴Ibid., p.62.

²⁵Ibid.

²⁶[1915] A.C. at 138.

Minister. The Minister may or may not follow these recommendations. It would seem that when the term "quasi-judicial" is used in England it is in reference to the procedure used in conducting such inquiries as referred to above. In the case of the National Labor Relations Board or Federal Trade Commission, Americans apply the term "quasi-judicial" to the power exercised by the above agencies in deciding issues between disputing parties or in determining whether in fact the Acts under which these agencies operate are being complied with.

Examples. The contrast between the views of British and American legal authorities regarding quasi-judicial proceedings is made manifest in two cases, one tried before the House of Lords and Privy Council,²⁷ the other before the Supreme Court of the United States.²⁸ Speaking for his colleagues in the Arlidge case, Lord Shaw stated:²⁹

. . . where . . . the question of propriety of procedure is raised in a hearing before some tribunal other than a court of law, there is no obligation to adopt the regular forms of judicial procedure. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice.

In Morgan v. United States, the Secretary of Agriculture had rendered a decision regarding the fixing of rates by stockyard market agencies for services rendered, without having personally attended the hearing which was conducted to determine whether or not rates being charged were excessive. When the matter first came before the U.S. Supreme Court,

²⁷Ibid.

²⁸Morgan v. United States, 298 U.S. 468.

²⁹Arlidge v. Local Government Board [1915] A.C. at 138.

the action of the Secretary was not upheld. In presenting the opinion of the Court, Hughes, C.J., commented as follows:³⁰

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of evidence, and making an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently referred to as a proceeding of a quasi-judicial character. The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining executive action. . . . For the weight ascribed by law to the findings--their conclusiveness when made within the sphere of authority conferred--rests upon the assumption that the officer who makes findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

It should be noted, however, that in a rehearing of the case, the position of the Court was modified, to the point where the Secretary's action was condoned. In this instance Franfurter, J., made the following comment:³¹

Although the administrative process has had a different development and pursues somewhat different ways from those of the courts, they are deemed to be collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.

It would seem that the difference between the American and British view of quasi-judicial procedure lies not so much in the definition of

³⁰298 U.S. 468.

³¹313 U.S. 422.

quasi-judicial function itself as in the tasks that quasi-judicial bodies are given to perform, and the standards they are expected to meet. The British emphasize the administrative aspect of the quasi-judicial process, while American practice features the judicial character of such a process.

A Canadian Example. On the Canadian scene, the privative clause of the British Columbia Workman's Compensation Act defines the powers of the Workman's Compensation Board.³²

The Board shall have exclusive jurisdiction to enquire into, hear, and determine all matters and questions of fact and law arising under this Part, and the action or decision of the Board thereon shall be binding and conclusive and shall not be open to question or review in any Court, and no proceedings by or before the Board shall be restrained by injunction, prohibition, or other process or proceeding in any Court or be removable by certiorari or otherwise into any Court; and without restricting the generality of the foregoing the Board shall have exclusive jurisdiction to enquire into, hear, and determine.

Despite the apparent all-inclusiveness of the powers granted to the Board by this clause, and indeed of privative clauses in similar Acts in other provinces, it remains a fact that there is legislative control, and there is right of application to the Courts, the latter to determine whether or not the Board "acts in such a manner that the Court is able to say that when it is acting without jurisdiction then it is not acting within the statute and thus is not entitled to the protection of the statute."³³ Decisions handed down by the courts in a number of

³²R.S.B.C. 1948, c.370, s.76.

³³H. Sutherland, "Privative Clauses and the Court," 30 Canadian Bar Review, 69.

Canadian cases attest to the validity of this statement.³⁴

Canadian practice, it would seem, is substantially in line with the American concept of the quasi-judicial function, namely, "a judicial power to decide a true lis inter partes entrusted to a tribunal other than the ordinary courts."³⁵

Efficacy of Quasi-Judicial Tribunals

A number of reasons are advanced for the use of quasi-judicial tribunals in preference to the ordinary courts. The Franks Committee, established by the British Parliament to report on administrative tribunals and inquiries in Britain, listed a number of advantages.³⁶ These included cheapness, accessibility, freedom from technicality, expedition, and expert knowledge of their particular subjects.

When one considers that concerning teachers alone, at least five different types of tribunals or administrative boards are in operation in some Canadian provinces, some of the advantages listed above take on new significance. In this study reference is made to arbitration boards, boards of reference, and discipline committees, all of which function after the American pattern of the quasi-judicial, while committees of investigation set up to inquire into allegations of unjust or improper termination of designation of principals, function

³⁴In Re Canada Safeway, Ltd., (1953) 3 D.L.R. 855; Re Workman's Compensation Act and C.P.R. (1950) 2 D.L.R. 630; Workman's Compensation Board v. C.P.R. (1952) 3 D.L.R. 621.

³⁵Wade, op.cit., p.227.

³⁶Report of the Committee on Administrative Tribunals and Inquiries. London: Her Majesty's Stationery Office, 1957, Cmnd. 218, p.9, para.38.

as an arm of the executive in the carrying out of policy and adhere more nearly to the British concept of the quasi-judicial. Boards of conciliation, on the other hand, are concerned only with an extension of negotiation, and cannot be classified as tribunals at all. In Alberta, the Teaching Profession Appeal Board acts judicially in hearing appeals from tribunals of the first instance, and may confirm or reverse the decision of the discipline committee. It may also confirm or vary any penalty imposed by the Executive Council.³⁷

The characteristics of these tribunals are examined individually as the various types are considered in this study. However they may differ in function and structure, the three basic characteristics outlined in the Franks Committee Report should be present in all of them. These include openness, fairness, and impartiality. The Report lists ways in which these objectives may be attained.³⁸

In the field of tribunals openness appears to us to require the publicity of proceedings and knowledge of the essential reasoning underlying the decisions; fairness to require the adoption of a clear procedure which enables parties to know their rights, to present their cases fully and to know the case which they have to meet; and impartiality to require the freedom of tribunals from the influence, real or apparent, of Departments concerned with the subject matter of their decisions.

One exception to the above statement should be noted. Unless both parties give their consent in advance, there seems little reason to justify the publication of discipline committee hearings. A discipline

³⁷The Teaching Profession Act. R.S.A. 1955, c.331, s.21(5).

³⁸Report of the Committee on Administrative Tribunals and Inquiries, p. 10, para. 42.

committee is essentially domestic in nature and its proceedings are not of general concern to the public. On the other hand, in cases where the person charged is found guilty, there may be good reasons for publicising the findings.

Because of the importance of their work to the parties concerned, great care should be taken both in their appointment and operation. Members of tribunals should be well qualified for the task they are to perform, and the procedure used prior to, during, and after hearings should be clearly defined. There should also be some provision for appeal and judicial review.

All of these questions are considered in some detail where appropriate throughout this study.

IV. SUMMARY

Legal machinery exists to adjudicate disputes between the individual and authority, and between individual and individual. Every time a legislature or parliament enacts a statute, new potential for such dispute is created. Every time an administrator or executive official takes steps to implement the legislation, friction is likely to develop.

The two chief channels through which efforts are made to alleviate the friction noted above are the courts of law and a great variety of special tribunals. The courts function according to fixed rules of procedure, and are strongly influenced by precedent and the common law. Quasi-judicial tribunals, on the other hand, operate with less devotion

to procedure and precedent, and are characterized by expeditiousness, accessibility, expertise and economy of operation. Because of the power which they wield, quasi-judicial bodies should strive for those attributes which are seen to characterize the courts. They are openness, fairness, and impartiality. These may be achieved in part through the exercise of great care in appointing the tribunals in the first place, and in establishing clear-cut rules and procedures for operation.

CHAPTER III

LEGAL JURISDICTION OVER CANADIAN TEACHERS

I. INTRODUCTION

The chief purpose of this study is, as already indicated, to discover the legal status of the Canadian teacher. This may be done by determining the nature of the legal relationships that exist between the teacher and his employers, his colleagues, his pupils, and the public. These relationships are examined in some detail in subsequent chapters, but before turning to a topical treatment of the subject, a review of the various jurisdictions in Canada may be in order. This review includes reference to the three chief jurisdictions, the federal, the provincial, and the local.

Federal jurisdiction is mainly constitutional and therefore involves the B.N.A. Act. The only other federal legislation to be considered other than in passing, is the Criminal Code of Canada.

There is extensive reference to provincial authority, especially to such acts of the legislatures as school acts, teaching profession acts, and tenure legislation. In cases where it applies, labor legislation is examined. Where regulations of provincial government departments are relevant, they too are considered.

School boards, being creatures of the legislature, have both mandatory and discretionary powers. In exercising such powers they may make regulations. Although a detailed study of school board

regulations in Canada must obviously remain outside the bounds of this study, instances where board regulations have significantly affected the teachers' legal status are commented upon.

Inasmuch as the chief hypothesis of this study is that quasi-judicial bodies are becoming increasingly significant in determining the legal status of the Canadian teacher, the extent, nature and powers of such bodies are examined at some length.

Finally, reference is made to the interpretive role which devolves upon the courts, with some indication as to the number and significance of cases given.

II. FEDERAL JURISDICTION

British North America Act

The B.N.A. Act in Section 93 specifically assigns responsibility to the provinces for the making of laws respecting education. In making education a provincial responsibility, however, Section 93 does impose certain conditions with respect to rights for religious minorities. This section reads as follows:¹

93: In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:-

1. Nothing in any such law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

2. All the Powers and Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall

¹B.N.A. Act, 1867, s.93.

be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

3. Where in any Province a System of Separate or Dissident Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor-General-in-Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

4. In case any such Provincial Law as from Time to Time seems to the Governor-General-in-Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor-General-in-Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor-General-in-Council under this section.

It should be noted that the above provisions apply to Ontario and Quebec only. Special provision was made for new provinces as they entered the confederation. Section 93 represents a compromise without which the whole idea of Confederation might have broken down. An examination of the early history of the colonies reveals such a diversity in the various educational patterns as to render the functioning of an effective central educational authority extremely difficult, if not impossible. At any rate, the compromise was arrived at so that the diversity of pattern was able to continue after Confederation. At the same time special denominational minority rights were protected against the encroachments of provincial legislatures which might occur as a result of future shifts in the balance of population.

Criminal Code of Canada

Nor is the B.N.A. Act the sole source of federal authority in

education. Clauses of the Criminal Code of Canada pertain to education, indeed to the conduct of teachers throughout Canada.

Section 63 of the Code outlines the conditions under which teachers may use force as a means of correcting pupil behaviour in the schools.² Moreover, inasmuch as teachers in some provinces³ may be suspended or dismissed because of being found guilty of committing a criminal offence, it follows that the Code has significant bearing upon the teacher's legal status. The implications of these provisions are examined in greater detail under another heading in this study.⁴

Federal Government Departments

A third area in which federal legislation applies to education concerns those federal government departments which are directly involved in education programs. A number of departments are so involved.⁵ Examples are: The Department of Labor, which is responsible for an extensive program of technical and vocational education; the Department of Citizenship and Immigration, which is responsible for the education of Indian children as well as for assisting new Canadians with language difficulties; and the Department of National Defense, responsible for the education of children of servicemen overseas, as well as for military colleges. The Indian Act also contains

²Criminal Code of Canada, s.63.

³Education Act 1960, c.50 (Nfld.)

⁴Infra, Chapter VIII.

⁵Organization and Administration of Public Schools in Canada (1960). Dominion Bureau of Statistics, p.233 ff.

provisions regarding education.

Bearing on the teacher's legal status is a condition of the federal vocational education legislation which requires that in order to qualify for federal funds for vocational or technical education, teachers employed in schools built with such funds must have certain minimum qualifications.⁶ The fact that provincial authorities may require additional qualifications of their technical teaching staff does not alter the fact that federal legislation directly affects teachers working in the provinces.

III. PROVINCIAL JURISDICTION

While the above information suggests that the federal government, despite the provisions of Section 93, B.N.A. Act, does play a role in education in Canada, education remains for the most part a provincial responsibility.

Provincial Legislation

The legal framework within which this responsibility is met is a body of legislation which has been built up in each province over the years. The acts comprising this body may be called Department of Education Acts, Education Acts, Public School Acts, Teaching Profession Acts, and a broad miscellany of related legislation. While a wide variety exists regarding the name given to these acts in the several

⁶Technical and Vocational Training Agreement as amended June 1964. Technical and Vocational Teacher Training Program (TT) Program 7 Regulations.

provinces, in substance the pattern of function is fairly constant.

In some instances,⁷ a Department of Education Act exists as a separate statute, providing the structure for the provincial department of education, through which agency some of the educational policies of the legislature are administered. In other provinces,⁸ the legal structure of the department of education may be included in a more all-inclusive school act.

Whether such provisions be included in a general school act or a separate department of education act, they include clauses establishing a department of education, and clauses spelling out ministerial powers. Some excerpts from the Education Department Act of Manitoba⁹ indicate the nature of these provisions.

3. There shall be a department of the Government of Manitoba called: "The Department of Education," over which the Minister of Education . . . shall preside, and the minister shall hold office during pleasure and shall have the management and direction of the department.

4. A deputy minister and such other officers as may be required to carry on the business of the department, may be appointed as provided in The Civil Service Act . . .

The various acts administered by the Minister are spelled out and include The School Attendance Act, The Public Schools Act, The Teachers' Retirement Allowances Act, etc.

⁷R.S.A. 1955, c.95; R.S.M. 1954, c.67; R.S.O. 1954, c.20.

⁸Public Schools Act, 1958, c.42 (B.C.); The New Brunswick Schools Act, R.S.N.B. 1952, c.204; The School Act, R.S.P.E.I. 1951, c.145.

⁹R.S.M. 1954, c. 56, s. 3 and 4.

The Act proceeds further to a statement of the powers which the Minister may exercise. As far as this study is concerned, the most significant of these ministerial powers are those enabling him to make regulations concerning teachers. Excerpts from section 6 of the Act¹⁰ illustrate this point.

6. The Minister may

.....
(b) make regulations respecting the duties of teachers.

.....
(1) make regulations respecting the qualifications . . . of teachers for teacher training institutions, model, secondary, summer, and public schools, and any other schools established pursuant to this Act.

.....
(bb) enter into any agreement with any person, corporation, or government, respecting any educational matter or thing.

One further significant provision is contained in s.8(1) of the Act.

8.(1) The minister may issue teachers' certificates of such grades or classes, and in such form, as he prescribes, and may cancel or suspend a certificate issued to a teacher for any cause that he deems sufficient; but the minister shall not cancel a teacher's certificate for any cause other than incompetency or disqualification on physical grounds until the case has been submitted to the discipline committee and the committee has reported to him with respect thereto.

The Ontario act¹¹ is more succinct on this point. It reads:

11.(1) The Minister may,

.....
(e) suspend or cancel any certificate or diploma granted under this Act or the regulations.

¹⁰Ibid.

¹¹The Department of Education Act, 1954, c.20 (Ont.)

While the authority for implementing the educational policies of the legislatures is vested in the legislatures, as outlined above, the policy itself is spelled out in a wide variety of ways. Whether it be through the all-inclusive Public Schools Act of British Columbia or the collection of Acts which constitute educational legislation in the Province of Saskatchewan, roughly equivalent topics are included. Policy with respect to instructional programs, supervisory arrangements, teacher certification, teachers' duties and responsibilities, school board responsibilities and a host of other topics is stated in this body of legislation.

In Alberta this body of educational law is included in The School Act. In Ontario it is distributed among The Public School Act, the Secondary Schools and Boards of Education Act, the Schools Administration Act. Included in this legislation is material outlining the rights, privileges, duties and responsibilities of teachers, provision for certification, conditions of appointment, bases of suspension and dismissal. The provisions of these statutes¹² are considered in some detail in subsequent chapters and under specialized headings.

Teacher organizations in all provinces but British Columbia are incorporated by a separate Act of the Legislature. The British Columbia Teachers' Federation is incorporated under The Benevolent Societies Act¹³ and legislative provisions for membership, expulsion,

¹²B.C.T.F. Handbook, 1963-64, p.13.

¹³1958, c.42 (B.C.)

appeal, fees, etc., are contained in the Public Schools Act.¹⁴ Of special significance to this study are the provisions of these teaching profession acts regarding statutory membership, (i.e. that provision whereby membership in a provincial teachers' organization is a condition of employment in a public school), deduction of fees from salary, the power to make by-laws, the codes of ethics, and particularly the provision for the operation of discipline or professional relations committees.

All provinces have detailed legislation concerning superannuation allowances, pension or retirement funds as they are variously called.

There is little uniformity in the statutory provisions for collective bargaining across Canada. No such provisions exist in three of the four Atlantic Provinces or in Ontario. Collective bargaining procedures for Nova Scotia teachers are contained in the N.S.T.U. Act,¹⁵ while in Manitoba and British Columbia such provisions are contained in the Public Schools Acts. Only in Alberta and Quebec do teachers bargain collectively directly under labor legislation. Alberta teachers bargain under the Alberta Labor Act.¹⁶ In Quebec, teachers belonging to C.I.C. and P.A.C.T. bargain under Loi de la convention collectif.¹⁷ Members of the P.A.P.T. do not avail themselves of these provisions but bargain on a non-statutory basis with school boards.

¹⁴Infra, Chapters IV, VI, VIII.

¹⁵1951, c.100 (N.S.)

¹⁶R.S.A. 1955, c.167.

¹⁷R.S.Q. 1941, c.163 as amended by 9-10 Eliz.II, c.74, 1961.

Saskatchewan is the only province with a separate act¹⁸ of the legislature providing for negotiation and conciliation with respect to teachers' salaries.

Collective bargaining procedures and practices are examined at some length in Chapter Five.

Provincial Regulations

As already indicated, a significant element in the legal framework of education is the regulations which Ministers of Education are authorized to make. Under given conditions these regulations have the force of law. Driedger's comments on subordinate legislation¹⁹ shed considerable light upon the legal status of such regulations. He uses the term "subordinate legislation" to embrace such subsidiary laws as regulations, rules, orders, by-laws and ordinances. These are also sometimes referred to as delegated legislation. He suggests²⁰

. . . a 'regulation' is usually understood to be a subsidiary law of general application whereas an 'order' is usually regarded as a particular direction in a special case.

He quotes Duff, C.J. in the Chemicals Reference:²¹

Every order in council, every regulation, every rule, every order, whether emanating immediately from His Excellency, the Governor-General-in-Council or from some subordinate agency,

¹⁸The Teachers' Salary Negotiation Act, R.S.S. 1953, c.184.

¹⁹Elmer A. Driedger, Deputy Minister of Justice, Ottawa, "Subordinate Legislation," Canadian Bar Review Vol. XXXVIII, #1, March 196-, p. 1 ff.

²⁰Ibid., p.2.

²¹Ibid., p.1.

derives its legal force solely from . . . an Act of Parliament . . . All such instruments derive their powers from the authority which creates the power, and not from the executive body by which they are made.

Provision for the making of regulations by a subordinate agency must be included in the statute pursuant to which the regulations are being made. Again Driedger has a pertinent comment.²²

The extent of the authority conferred by a statute re the making of regulations is affected by the words of the clause authorizing such regulations.

That is, the clause worded "The Governor-General-in-Council may make regulations for carrying out the purposes and provisions of this Act" would probably not authorize anything more than purely procedural or administrative regulations. On the other hand, if the empowering clause reads ". . . may make such regulations as he deems necessary," this implies a much broader scope in the making of regulations. The authority becomes the sole judge of necessity, except possibly if bad faith were established. More specific authority may be conferred by defining a particular purpose or by assigning a subject matter for legislation, regulations, etc.²³

In a concluding statement Driedger says:²⁴

In considering whether a regulation is valid it is important of course to examine the legal principles and legal precedents. But in considering the nature and scope of statutory power, one

²²Ibid., p.28.

²³R.S.M. 1954, c.56, s.6(b). (The minister may make regulations respecting the duties of teachers.)

²⁴Driedger, op.cit., p.34.

must not overlook the words of the statute or the principles of language.

The extent and scope of ministerial or department of education rules or regulations are such as to prohibit any extended reference to them in this study. Excerpts from the Rules of the Council of Public Instruction of B.C.²⁵ may serve to signify the nature of such rules or regulations.

Division (5) PROCEDURES FOR APPOINTMENT OF TEACHERS. Probationary Appointments.

5.01 The Board of School Trustees of a school district may appoint a teacher on probation for a period not exceeding one year . . .

.
5.03 The right of appeal as provided in section 134 of the Public Schools Act does not apply with respect to termination of a probationary appointment.

5.04 Every probationary appointment, if not so terminated under section 5.01, is a continuing engagement until terminated pursuant to the provisions of the Public Schools Act.

Further rules cover temporary appointments, an offer and acceptance of appointment, form of notice of appointment of a teacher; and two further divisions, (6) and (7), deal with the duties of teachers, and their certificates of qualification. As pointed out earlier, when these rules, regulations, or by-laws are pursuant to and not in conflict with the Act, they have the force of law.

III. LOCAL SCHOOL AUTHORITIES

Examination of education and school acts of all the provinces

²⁵ Manual of the School Law and Rules of the Council of Public Instruction, Province of British Columbia, p. 6 ff. The Council is empowered to make such regulations by section 17 of the Public Schools Act, 1958, c.42 (B.C.)

reveals that legislatures have established two agencies whose function it is to administer legislative policy respecting education. One, the department of education, is responsible for administering general province-wide policy; the other, the local authority, for administering policy in the local area.

School Committees

For the most part, authority at the local level devolves upon the school board, although in some instances the general function of the school board is performed by a committee of the municipal council. This latter condition applies in the county units of Alberta where county council²⁶

. . . has and shall exercise all the rights, powers, privileges, duties and functions conferred on . . . a board of trustees of a school division by The School Act in respect of school matters.

In Nova Scotia²⁷ the Municipal School Board, although classified as a school board, is a creature of the municipal council and of the provincial government, with the council appointing four of its members, the province three.

It should be pointed out that while a municipal corporation comprises all the citizens of a particular area with the municipal council acting as the corporation's board of directors, the members of the school board comprise the school board corporation. In the case where the school affairs are administered by a committee of the

²⁶The County Act, R.S.A. 1955, c.64, s.13(b).

²⁷The Education Act, R.S.N.S. 1954, c.78, ss. 49, 52.

municipal council, this committee while not a corporation in itself, acts as the agent of the municipal corporation.²⁸

School Boards

There are two categories of power assigned to school boards by the legislature, one mandatory, the other discretionary. When exercising its mandatory powers, a school board is expressing the will of the legislature in educational matters. The extent to which a board exercises discretionary powers may reflect local aspirations and ambitions in the field of public education. As the term implies, the board must exercise its mandatory powers. Included in these mandatory powers is the obligation to appoint and designate teachers.

In some legislation, items listed under the term "mandatory powers" are called duties. Those listed under "discretionary powers" are called powers. The Schools Administration Act²⁹ of Ontario makes this distinction. An excerpt reads:

- s. 32. Every board shall,
 - (i) appoint for each school that it operates a principal and an adequate number of teachers all of whom shall be qualified according to the Acts and regulations administered by the Minister.
- s. 33. A board may
 - (b) subject to Part III, appoint and remove such teachers, officers and servants as it may deem expedient, determine the terms on which they are to be employed, and fix their salaries and prescribe their duties.

²⁸For a more complete treatment of the corporate status of school boards see F. Enns, The Legal Status of the Canadian School Board (Toronto: The Macmillan Company of Canada, Ltd., 1963), p.36 ff.

²⁹1954, c.86 (Ont.)

School Board Regulations

In carrying out its responsibilities, whether to the legislature or to its local public, a school board has authority to make subordinate legislation, classed either as regulations or by-laws. A by-law has been defined by Lord Killowen in Kruse v. Johnson³⁰ as

. . . an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers, ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of persons who come under its operation as to acts which, but for the by-law, they would be free to do or not do as they pleased. Further, it involves this consequence--that, if validly made, it has the force of law within the sphere of its legitimate operation.

Section 98 of the Public Schools Act³¹ of British Columbia is typical of the provision made by legislatures for the making of regulations at the local level. It reads:

The Board of a district may . . . make by-laws not inconsistent with the provisions of this Act or with the rules and orders of the Council of Public Instruction, relative to the organization of meetings of the Board and to any matter over which power or authority is by this Act expressly vested exclusively in the Board.

The validity of by-laws touches upon a number of points of law. Among the criteria³² of such validity are: (1) If the constitution of a corporation provides that by-laws are to be confirmed by an external authority, such by-laws will be invalid unless so confirmed. (2) A by-law must not be opposed to the constitution of the particular

³⁰[1898] 2 Q.B. 91 at p.96.

³¹1958, c.42, s.98(a) (B.C.)

³²Rt. Hon. Lord Simonds, Halsbury's Laws of England, 3rd Edition, Vol.9 (London: Butterworth & Co.(Publishers) Ltd., 1954), p. 42 ff.

corporation. (3) A by-law must be reasonable. (4) A by-law must not be repugnant to the general law.

An Ontario case³³ gives emphasis to the force of a school board by-law. In Lacarte v. Board of Education of Toronto, a teacher was dismissed pursuant to the regulations of the board. In an action to secure redress, the judgment handed down contained the following statement:³⁴

Per Rand, J.

The engagement of a teacher was formally embodied in what purports to be a written contract of employment. A Regulation of the respondent Board declares that the Board may terminate the contract at any time on one month's notice. The contract provided that it could be terminated by giving notice as called for by the regulations "provided they are in accordance with the statutes and departmental regulations in that behalf." Nothing in any statute forbids such a Regulation and the contention is that it has not been shown to be in accordance with departmental Regulations. In view of the general authority of the Board to engage teachers, the ordinary rule of omnia praesumuntur rite esse acta applies; and on the assumption of a contractual employment, the onus was on the plaintiff to show that the Regulation was in conflict with those of the Department and no attempt was made to do that: and the conclusion follows that there was an effective termination of the engagement as of June 30, 1948.

Illustrations of the power of school boards respecting teachers may be readily found. The School Act of Alberta provides that the board of a city district may

. . . make provision by by-law for effecting and maintaining group insurance . . . coverage applicable to and for the benefit of teachers.³⁵

³³[1955] 5 D.L.R. 369.

³⁴For a discussion of the validity of corporation by-laws see Enns, op.cit., p.48 ff.

³⁵R.S.A. 1955, c.297, s.185(b).

It provides, also,³⁶ that a board may suspend or dismiss a teacher summarily for gross misconduct, neglect of duty, or for refusal or neglect to obey any lawful order of the board. It follows, of course, that action taken by boards as a consequence of holding these powers may be challenged and brought before the courts for interpretation.

That school boards do in fact make regulations, by-laws, orders, etc., that affect the legal status of teachers is amplified in a study by Myhre³⁷ of school board policy handbooks in Alberta. Myhre notes that while in many instances, written school board policy consists of a re-emphasis of the Revised General Regulations of the Department of Education, these regulations are interpreted by the board in distinct ways and applied at the local level. While The School Act empowers boards to transfer teachers from one school or room to another, local policy relating to deadlines for transfer requests, and factors considered in granting them are outlined in many handbooks.

IV. QUASI-JUDICIAL JURISDICTION

It has already been pointed out that the teacher's legal status is significantly affected by quasi-judicial proceedings. Provision is made in legislation for a number of quasi-judicial bodies to deal with problems and disputes to which teachers may be a party. The

³⁶Ibid., s. 350(1).

³⁷A.R. Myhre, "A Survey of Practices and Principles Involved in the Writing and Revision of School Board Policy Handbooks." (Unpublished Master's thesis, University of Alberta, 1961), p. 46 ff.

chief of such provisions concern the discipline or professional relations committee of the teachers' organization, the board of reference, and conciliation or arbitration boards.

Discipline Committees

All of the teachers' organizations in Canada have discipline or professional relations committees, some of which are clothed with substantial powers to investigate alleged breaches of the code of ethics to which the membership has either overtly or impliedly subscribed. An excerpt³⁸ from The Teaching Profession Act of Alberta will serve to illustrate the substantial legal powers which the A.T.A. discipline committee may bring to bear in an instance of alleged unprofessional or unethical conduct on the part of one of its members.

16. (1) An investigation may be made with respect to the professional or ethical conduct of any active member but no disciplinary action shall be taken against a member unless a hearing has been held by the discipline committee. . . .

.
18. (1) In every hearing the discipline committee shall
 (a) allow the accused person to be represented by counsel
 (b) hear all evidence in support and in defence of the complaint
 (c) decide the guilt or innocence of the person, and
 (d) report its decision to the executive council and recommend a penalty it thinks suitable, if any.

The power of the executive council to impose a penalty on the person found guilty is no less real.³⁹ The executive council may

³⁸R.S.A. 1955, c.331.

³⁹Ibid., s.19.

19. (a) expel the person from the association
- (b) suspend the person from the association for any period of time it considers proper
- (c) discipline the person in any way it considers proper
- (d) recommend that the Minister suspend or cancel the person's certificate.

It should not be inferred from the above that the teacher is being unjustly treated by the collective power of his peers. Rather, one could cite substantial evidence that teacher organizations go to great lengths to protect the civil and legal rights of their members. Provision for counsel, while under investigation, is made, also provision for appeal to higher authority. Such provisions are elaborated upon later.⁴⁰

Boards of Reference

While the discipline committee's function is to cope with problems arising between the teacher and his professional organization, or between individual teachers, and usually related to the code of ethics, other agencies adjudicate between teachers and school boards. In the case of the board of reference, as it is generally called, the issue usually revolves around alleged illegal termination of tenure or of contract.

Teacher tenure has been defined as⁴¹

. . . a set of rights, conveyed and protected by law, whereby a teacher cannot be dismissed from his position except under procedures laid down by statute. 'Tenure teacher' means one

⁴⁰Infra, Chapter VII.

⁴¹J.F.Swan, "Historical Survey of the Board of Reference in Alberta," (unpublished Master's thesis, University of Alberta, 1961), p.3.

who lawfully enjoys such rights, one who therefore can be said to possess 'tenure status'.

In the event that a teacher believes himself to have been wrongfully dismissed, tenure legislation provides him with recourse. Such recourse may take the form of conciliation, whereby a conciliation committee, appointed for the purpose, attempts to find a solution. Failing solution, the teacher has further recourse. If the teacher is an Ontario teacher, he may apply to the Minister of Education, who may grant, or refuse to grant, a Board of Reference. In practice, the Minister has tended to grant an application for a Board of Reference, if such application enjoys the support of the Ontario Teachers' Federation.⁴² If a Board is granted and a hearing held, the decision of the Board is binding on both parties to the dispute.⁴³ In Saskatchewan, the decision of a Board of Reference dealing with termination of contract on a date other than June 30 is binding, while the decision of a conciliation board on a termination of tenure dispute is not.⁴⁴ In Manitoba, if the conciliation board's recommendation goes unheeded, the teacher has recourse to the court of the county in which the dispute takes place.⁴⁵

Legislation providing for Board of Reference machinery has a

⁴²Interview with Miss Hodgins, Secretary, O.T.F.

⁴³The Schools Administration Act, 1954, c.86, s.29(1) (Ont.)

⁴⁴The School Act, R.S.S. 1953, c.169, s.221(11), and The Teacher Tenure Act, R.S.S. 1953, c.185, s.10.

⁴⁵The Education Department Act, R.S.M. 1954, s.26(5).

number of common characteristics. All such boards are clothed with substantial legal power. Their members, usually three in number, are given the powers conferred upon a commissioner by the provincial Public Inquiries Act. The following excerpt from An Act Respecting Public Inquiries⁴⁶ typifies the nature of the powers conferred upon such commissioners.

3. (1) The Commissioner or Commissioners shall have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of law in civil cases, and any wilfully false statement by any such witness on oath or solemn affirmation shall be a misdemeanor punishable in the same manner as wilfull and corrupt perjury.

A general characteristic of tenure legislation is that it makes provision for a probationary period of service to precede the acquisition of tenure status. An interesting aspect of the tenure question concerns whether or not the provisions of tenure legislation apply to designated positions. (A designated position refers to the designation of a teacher as principal or vice-principal.) The matter is open to question with one court judgment having found that in terminating the contract of a principal, the board had in fact terminated his contract as a teacher as well.⁴⁷ The efficacy of tenure legislation in Canada is considered in some detail in another chapter.⁴⁸

⁴⁶R.S.N. 1952, c.24.

⁴⁷Re Houle v. Mattawa R.C. Separate School Board (mimeographed copy of judgment delivered Nov. 5, 1961, S.C.O.)

⁴⁸Infra, Chapter VI.

Conciliation and Arbitration Boards

Legislation providing for the arbitration or conciliation of teacher-board salary disputes is also far from being uniform in character in the provinces of Canada. In British Columbia, the Public Schools Act⁴⁹ provides in successive scheduled stages for negotiation, conciliation, and, if necessary, arbitration. Arbitration is conducted by a Salary Arbitration Board whose recommendations are binding upon both parties. A weakness in the conciliation provision in British Columbia is that only two conciliators are appointed, one by each contending party, thus virtually assuring the continuance of the negotiation deadlock.

As indicated earlier, Alberta teachers bargain under the provisions of The Alberta Labour Act.⁵⁰ Under these provisions, a properly conducted strike is legal. The recommendations of the conciliation board provided for by The Labour Act may be accepted or rejected by either or both parties to the dispute.

In Saskatchewan, the award of a Board of Conciliation set up under the provisions of The Teachers' Salary Negotiation Act is binding only if the binding effect of the award is agreed upon by both parties to the dispute.⁵¹

Manitoba teachers bargain collectively and in case of disputes

⁴⁹1958, c.42, s.138 ff. (B.C.)

⁵⁰R.S.A., 1955, c.167, s.93(7).

⁵¹R.S.S., 1953, c.184, s.97.

a conciliation officer attempts a settlement. If these attempts fail, a board of arbitration may be appointed to deal with the question. The award of such a board is binding upon both parties.⁵² Strikes are specifically forbidden.⁵³

Ontario teachers have avoided legal arbitration and conciliation, depending rather upon flexibility and persuasive power in negotiation.⁵⁴ There is no provision in Ontario legislation for collective bargaining for teachers, nor is there provision for arbitration.

In Quebec also, mutually agreed upon bargaining procedures between units of the Provincial Association of Protestant Teachers of Quebec and school boards stand in the place of legal provisions.⁵⁵ Affiliates of La Corporation des Instituteurs et Institutrices Catholiques du Quebec and the Provincial Association of Catholic Teachers of Quebec bargain collectively on behalf of their members under the terms of loi de la convention collectif (Collective Agreement Act). Arbitration is also provided for with awards binding upon both parties.⁵⁶

In New Brunswick, a procedure for mediation has been agreed upon by the New Brunswick Teachers' Association, the New Brunswick School Trustees' Association and the Minister of Education. As the term "Board of Mediation" implies, this body can mediate salary disputes but

⁵²R.S.M., 1954, c.215, and Amendments of S.M., 1960, s.381(3).

⁵³Ibid., s.384(1).

⁵⁴Interview with Miss Hodgins, Secretary of O.T.F.

⁵⁵Letter from T.H.G.Jackson, Executive Secretary, P.A.P.T.

⁵⁶Interview with J. Lamy, Secretary, C.I.C.

its findings or recommendations are not binding on either party.⁵⁷

In Nova Scotia, units of the Nova Scotia Teachers' Union bargain collectively for salaries. A conciliation procedure is in operation. The findings of conciliation commissions are not binding.⁵⁸

Neither Newfoundland nor Prince Edward Island has collective bargaining procedures. In the case of Newfoundland, negotiation concerning salaries takes place almost entirely between the Newfoundland Teachers' Association and the Government of Newfoundland.

V. THE ROLE OF THE COURTS

The foregoing has been related primarily to statute law, regulations pursuant thereto, and to the functioning of such quasi-judicial bodies as are in part responsible for carrying out specific provisions of statute law.

Despite the existence and functioning of such agencies, a major responsibility for interpreting the law devolves upon our system of courts. It has already been amply demonstrated⁵⁹ that case law contributes very substantially to the legal status of both the Canadian school pupil, and the school board.

An examination of the cases involving teachers which are reported in the various Law Reports indicates that for the teacher,

⁵⁷N.B.T.A. Handbook, 1961, p.39. ⁵⁸N.S.T.U.Act, 1957, s.1.

⁵⁹P.F.Bargen, The Legal Status of the Canadian School Pupil (Toronto: The Macmillan Company of Canada, Ltd., 1961); and F. Enns, The Legal Status of the Canadian School Board (Toronto: The Macmillan Company of Canada, Ltd., 1963), p. 11.

also, judge-made law and the doctrine of legal precedent have significant implications. Courts may rule on questions of whether the provisions of the statutes have been carried out, or they may further rule on whether or not quasi-judicial bodies are properly following the procedures laid down for them in the statutes or required by 'natural justice.' In Wagstaffe v. Public School Board S.8 of Raglan,⁶⁰ the court ruled that The Teachers' Board of Reference Act does not take away the right of a teacher to sue in case of dismissal. On the other hand, an Alberta Court⁶¹ dismissed an action by a teacher for damages for wrongful dismissal, because he had failed to appeal to the Minister and thus exhaust the administrative remedy that lay open to him. The School Act made provision for such appeal and the teacher's failure to avail himself of this provision constituted grounds for the dismissal of his case. In a subsequent case,⁶² Richards v. Athabasca School Trustees, it was held that, in circumstances where a board has no title in point of law to dismiss a teacher, an appeal to the Minister would be inappropriate. In this way, the jurisdiction of the courts in matters of law was upheld.

Approximately one hundred cases concerning teachers particularly are reported in the Law Reports. These cases relate to a variety of

⁶⁰[1948] O.W.N. 120 (C.A.)

⁶¹Murray v. Ponoka S.D. (1929), w W.W.R. 439 24 Alta. L.R. 205 [1929] D.L.R. 425 (C.A.)

⁶²[1931] 1 D.L.R. 443.

disputes involving contract, qualifications and remuneration, collective bargaining, dismissal, power and authority of teachers, and liability in case of accident. Some of these cases were heard in county courts, some in provincial superior courts, still others went on to the Supreme Court of Canada. Some were settled in trial courts, others moved from one appeal to another.

As indicated at the beginning of this study, an attempt will be made to discover whether any common law principles can be elicited from a study of these cases. It is not intended here to embark upon an extended commentary upon the hierarchy and structure of Canadian courts nor upon the manner in which court proceedings are carried out in this country.⁶³ In succeeding chapters of this study, a review of pertinent cases along with an examination of pertinent legislation and the functioning of administrative agencies are reported, and an attempt is made to discover, as fully as possible, the legal framework within which the Canadian teacher approaches his task.

VI. SUMMARY

Legal status derives primarily from legislation, judicial procedures, and the common law. Legislation affecting Canadian teachers flows from three sources, the federal Parliament, provincial legislatures, and local school boards or school committees. It may be statutory or subordinate legislation.

⁶³For a comprehensive account of the function of Canadian Courts, see Enns, op.cit., Chapter II.

The B.N.A. Act, Section 93, assigns to the provinces the right exclusively to make laws respecting education. At the same time it affords a measure of protection to denominational minority rights. The Criminal Code of Canada confers upon teachers the right to discipline pupils.

Most of the direct legislation affecting teachers derives from provincial sources, where legislatures spell out educational policy in school acts or education acts. The responsibility for carrying out these policies rests upon two agencies, the provincial department of education, and the local school board or school committee. Each is empowered to make regulations pursuant to the legislation under which it operates. These regulations, provided they are properly applied, have the force of law.

A second source of law is the common law. In many instances this derives from ancient custom and usage. Such concepts as master-servant relationship and in loco parentis have a common law origin. Legislation at variance with common law must be specific, and in general will be strictly construed by the courts.

The third major source of law derives from judicial procedures. These fall into two categories. There are quasi-judicial bodies which adjudicate differences between teacher and employer, teacher and teacher, and between the teacher and his professional organization. Finally, the courts, functioning in their regular capacity, have occasion to interpret legislation and to hear disputes between teachers and their employers, members of the public, etc. In many instances the

courts have the additional function of supervising the work of quasi-judicial bodies, especially in regard to questions of jurisdiction and points of law.

CHAPTER IV

THE LEGAL STATUS OF THE TEACHER REGARDING CERTIFICATION, APPOINTMENT, AND TRANSFER

I. INTRODUCTION

Inasmuch as members of the teaching profession are involved in offering service to the public, the manner and nature of their certification and appointment are matters of public concern and are subject to public approval. As these matters are also of great significance to the profession, they receive careful attention from the teachers' professional organizations. A review of the legislation and teacher organization policy on this topic reveals a wide measure of consistency among the ten provinces of Canada. As might be expected in an area where both public and professional interests are critically involved, the courts have been called upon to give interpretation to legislation and to find a solution of conflicts that have developed from time to time. In this chapter, legislation and regulations regarding certification, appointment and contract and transfer of teachers are assessed. The question of a definition of a teacher is considered. Extensive reference is also made to the findings of the courts, including, where pertinent, findings of American courts. The purpose of this chapter is to arrive at a legal definition of a teacher and to outline the legal status of a teacher in regard to certification, appointment, and transfer.

II. CERTIFICATION

Legislative Authority for Certification

One who seeks to practise law, medicine, dentistry, or a like profession, must first secure a licence or certificate indicating that he possesses the qualifications necessary for the practice of his profession. Likewise, anyone wishing to teach in a public school must have public sanction so to do. This sanction comes in all the provinces of Canada in the form of a certificate, licence, or letter of authority, issued under the authority of the Minister of Education, or one of equivalent position. Section 262 of The Public Schools Act of Manitoba illustrates the provision for this certificating or licensing function:¹

No teacher is legally qualified who does not at the time of his engagement by a board of trustees, and during the period of engagement, hold a valid and subsisting teacher's certificate issued under The Department of Education Act by the Minister.

Ontario's provision is substantially the same.

Subject to The Department of Education Act, 1954, no person shall be employed or act as a teacher in an elementary or secondary school unless he is qualified as prescribed by the regulations.

A further section adds that:

. . . subject to The Department of Education Act, 1954, a certificate of qualification may be awarded only to a British subject of good moral character and physically fit to perform the duties of a teacher, who passes the examination prescribed by and otherwise complies with the regulations.

¹R.S.M. 1954, c.215, s.262 (1).

A subsequent amendment to the Act also provides for certification for one who (i) has applied to become a British subject and whose application is pending, or (ii) has filed a declaration of intention to become a Canadian citizen in accordance with The Canadian Citizenship Act.²

The regulations³ referred to spell out the conditions under which either interim or permanent teaching certificates may be issued. Such conditions include successful completion of stipulated courses of study or equivalent training elsewhere, and in the case of the permanent certificate, evidence of two years of successful teaching. This period of probation varies in length from province to province. According to Cameron, in a study on teacher certification in Canada,⁴ there is a trend away from requiring a stipulated period of successful teaching as a necessary prerequisite of permanent certification. He notes that such periods of probation are not required in Saskatchewan, Roman Catholic Quebec, New Brunswick, Prince Edward Island, and Newfoundland. He goes on, however, to point out that there are strong proponents as well as opponents of the probationary requirement, and suggests that teacher organizations, in pressing for more stringent standards for the acquisition of a permanent certificate, are attempting to move toward a greater say in determining who shall be admitted to the profession.

²The Schools Administration Act, R.S.O. 1960, c.86, s.19 (1).

³Revised Regulations of Ontario, 1960. Regulation 88 under The Department of Education Act.

⁴Donald R. Cameron, Teacher Certification in Canada. Information Bulletin 60 - 2, Research Division, Canadian Teachers' Federation, 1960.

In British Columbia,⁵ the Council of Public Instruction is the authority responsible for certification. The Public Schools Act reads:

17. The Council of Public Instruction may, by rule, or order, or both:-

.....
 (f) determine the grades and classes of certificates of qualification to be issued to teachers or other persons to whom this Act applies and govern the granting of the certificates.

The Department of Education Act of Alberta provides that:⁶

7. The Minister with the approval of the Lieutenant-Governor-in-Council
 a) may make regulations

.....
 (iii) for the examination, licensing and grading of teachers and for the examination of persons who wish to possess certificates of having completed courses of study in any school.

With the passage of Bill 60 by the Quebec Legislature in 1964 and the establishment of a Department of Education in that province, certification of teachers is no longer a denominational responsibility.

Only Newfoundland retains a certification procedure involving decentralization of certifying authority. Under the provisions of The Education (Teacher Training) Act⁷ each denomination with not less than 10,000 adherents has its own Board of Examiners responsible for, among other things, examining candidates for teaching and granting certificates to those persons who have "complied with the rules and

⁵Public Schools Act, 1958, c.42, s.17 (B.C.)

⁶R.S.A. 1955, c.95, s.7.

⁷R.S.N. 1951, c.102, s.3.

regulations of the Council of Education and such further general requirements as the Board with the approval of the Minister of Education prescribes." It should not be inferred from this, however, that certification of teachers in Newfoundland is completely decentralized.

Teachers are all trained at Memorial University; the certification of teachers is governed by regulations approved by the Lieutenant-Governor-in-Council; and all teaching certificates must be countersigned by the Deputy Minister of Education. Thus, teacher education programs are common to all denominations, with the exception of any additional special qualifications in religious knowledge which the Boards may wish to require.⁸

Cameron notes, in summary, that the powers of provincial authorities, or agencies and organizations subject to the control of the provincial authorities, are as follows:⁹

- a) To determine the types of teacher certification and requirements for each class of certificate.
- b) To issue, renew, suspend or cancel teachers' certificates.
- c) To establish the regulations governing the certification of teachers.
- d) To rule on the standards required of applicant teachers from outside the province.

In addition to certificated teachers, there are those who obtain a variety of temporary licences, ranging from a letter of standing in Ontario, issued to one whose training has been acquired outside the province, to letters of authority granted on a temporary basis to those who do not qualify for a certificate.

Certifying Authorities

While the courts are quite specific in interpreting the word

⁸Cameron, op.cit., p.24.

⁹Ibid., p.25.

"teacher", they show no disposition to control those who certify teachers. Although the authority to issue certificates is usually delegated, the basis upon which such certificates are issued is the legislation itself and the regulations pursuant thereto. Commenting on the matter, Garber and Edwards state that:¹⁰

Those to whom the state has delegated authority to determine whether a prospective teacher has met the statutory requirements for a certificate in the case where the requirements have been met, perform a discretionary duty and the courts will not control their discretion unless it is abused. But the officer or agency authorized to issue certificates may not refuse to issue a certificate without a good cause.

They cite an instance¹¹ of a plaintiff appearing before a board of school examiners to take an examination for a teaching certificate and being told it would be useless to take the examination unless he could clear himself of certain charges of a moral nature. He denied the truth of the charges but admitted that prosecution had been instituted against him, and, because of the charges, his certificate to teach in that district had been revoked. Nevertheless he took the examination and was later informed that his grades were such as to entitle him to a certificate but that, in the judgment of the board, his moral character did not justify his being issued a licence. He then brought an action in mandamus to compel the board to issue

¹⁰L.O.Garber and Newton Edwards, The Law Governing Teaching Personnel (Danville, Ill.: The Interstate Printers and Publishers, 1962), p.3.

¹¹Crawford v. Lewis 170 Ky. 589, 186 S.W. 492 (1916). Decided by the Court of Appeals in Kentucky. Quoted in Garber and Edwards, op.cit., p.18.

the certificate to him. The lower court ruled against him, and the higher court affirmed its judgment. Stating that the board of examiners was vested with discretionary powers (Kentucky statutes read: "No certificate shall be granted to any person who indulges in drunkenness, profanity, etc., or who is otherwise unfit to be a teacher") the court held:

Upon a consideration of the evidence we are unable to say that appellees acted arbitrarily or abused a sound discretion in the investigation made or in their action thereupon in refusing to issue a teacher's certificate to appellant. Wherefore judgment is affirmed.

In arriving at its decision the court apparently believed that the board of examiners had behaved in a reasonable fashion in refusing to grant the applicant a certificate. The court noted that the board of examiners had been granted discretionary powers by the legislature and that in the case before it, the court's function was not to decide what the board of examiners should, in its discretion, have done, but rather to decide whether or not in using its discretion the board had acted in a capricious, arbitrary, or unreasonable manner. The court's decision confirmed the action of the board.

One should not assume from the foregoing account of legislation and litigation that government authority and judicial interpretation constitute the only influences at work in the teacher certification process in Canada. Once again, Cameron's study is informative. In a concluding statement he says:¹²

¹²Cameron, op.cit., p.18.

Although the provincial authorities retain control over teacher certification, there are signs that professional standards are being derived more frequently through processes of consultation and cooperation. It is difficult to assess the full significance of the increasing number of advisory committees, the growing activities of teachers' associations and the greater responsibilities of universities in teacher education and certification. Viewed broadly, however, there seems to be some development in decentralization.

A study of the tables contained in Cameron's study¹³ indicates the source from which he draws the above conclusion. These tables show that in five provinces, Alberta, Saskatchewan, Protestant Quebec, Nova Scotia and Prince Edward Island legally constituted bodies comprising representatives generally of teacher organizations, trustees' organizations, and teacher educators and departments of education act as an advisory body to the Minister of Education regarding teacher certification. In the other five provinces representative bodies, though not legally constituted, do have opportunities of making their influence felt in teacher certification matters. In no province are teacher organizations denied some voice either direct or indirect in certification proceedings. On the other hand, a glance at the relative numerical representation of teacher organizations on certification advisory bodies reveals that, as yet, teachers are far from controlling the entry of certified members into their professional ranks. It is interesting to speculate upon what the reaction of teachers and teacher organizations would be if they were offered such control.

¹³Ibid., Appendix A, pp. 125-133.

A Certificate Not a Contract

A certificate to teach is not a contract but a privilege, and may be suspended or cancelled. Some legislative provisions to this effect follow.

British Columbia:¹⁴

The Council of Public Instruction may . . . with the approval of the Lieutenant-Governor-in-Council suspend or cancel for cause the certificate of qualification of any teacher.

Alberta:¹⁵

The Minister may suspend or cancel for cause any certificate granted under the regulations of the Department.

Manitoba:¹⁶

In addition to the Minister's power to cancel or suspend a teacher certificate, as indicated earlier,¹⁷ The Education Department Act provides that

An inspector of schools may suspend the certificate of any teacher under his jurisdiction, for incompetency, misconduct, or violation of this Act or The Public Schools Act or any regulation made under either of these acts.

Ontario:¹⁸

The Minister may suspend or cancel any certificate or diploma granted under this Act or the regulations.

It will be noted from the above excerpts that while, in general, power

¹⁴Public Schools Act, 1958, c.42, s.18(e) (B.C.)

¹⁵The Department of Education Act, R.S.A. 1955, c.95, s.12.

¹⁶R.S.M., 1954, c.56, s.8 (2). ¹⁷Supra. p. 39.

¹⁸The Department of Education Act, 1954, c.20, s.11(e) (Ont.)

to cancel certificates rests with the Minister, the conditions under which he may do so, vary. In the western provinces, the Minister may cancel certificates only for cause, while in Ontario he may cancel certificates without the cause being stipulated. It is noteworthy also that in Manitoba, the inspectors have power to suspend certificates for a specified cause. Once again, however, the statutes do not tell the whole story. The part played by teacher organizations in the matter of suspension or cancellation of certificates, while not controlling, is strongly influential and is considered at length in the chapter dealing with discipline and professional relations committees.¹⁹

American authorities do not differ significantly from the Canadian view of this matter. Edwards has a relevant comment.²⁰

The state has plenary power with respect to teachers' certificates. A teacher's certificate is not a property right, and it has none of the elements of a contract between a teacher and the state.

He refers to a judgment²¹ which emphasises the privileged nature of a teaching certificate.

A certificate to teach in the public schools is merely a licence granted by the state and is revocable by the state at its pleasure . . . It is not a contract protected by the due process provisions of either the state or federal Constitution. Such a licence is presumably accepted and held subject to the then existing and any future law providing for its forfeiture. The Legislature had authority to make the law as it is, and if the applicant did not wish to submit to the conditions affixed for its forfeiture he

¹⁹Infra, Chapter VII.

²⁰Newton Edwards, The Courts and the Public Schools (Chicago: University of Chicago Press, 1955), p.439.

²¹Mars v. Matthews, 270 S.W. (Tex.) 586, Quoted in Edwards, op.cit., p.439.

should not have accepted the certificate. One who accepts a licence impliedly agrees to submit to the tribunals which the enjoyment of the privilege granted. This is not a situation where the law attacked is thrust upon the complainant, nor is it one where an inherent right has been invaded, but is one in which the complainant has voluntarily sought and secured a statutory privilege to be enjoyed subject to statutory conditions.

Certification a Condition of Employment

The courts have long since established that certification of some description or other is a condition of employment. One teaching without a certificate, licence, or letter of authority is merely a volunteer and cannot recover for services on quantum meruit. A New Brunswick case is unequivocal.²²

An unlicensed teacher was engaged by trustees and a contract signed. The School Act C.S. 1903 c.50 provided that the local Superintendent be authorized to certify those whom he thought qualified to teach. In this instance the Superintendent refused to issue such certificate, on the grounds that the person was unqualified and that qualified people were available. Because of the Superintendent's action, funds with which the Trustees might have paid the teacher were withheld by the County authority. The teacher sued the trustees on quantum meruit.

Held: (1) The contract is unenforceable because under The School Act C.S. 1903, c.50 it is ultra vires of the school trustees to employ an unlicensed teacher, and (2) the defendants are not liable on quantum meruit for the services of the plaintiff because (a) The employment of the plaintiff was ultra vires, (b) There was no completed work which the trustees could accept or reject.

²²Bright School Trustees v. Yerxa (1910) 40 N.B.R., 351, 10 E.L.R. 1 C.A. [Abridged Vol.1 (col.229)].

In Stark v. Montague,²³ Robinson, C.J. had commented on this point.

It seems to be clear in The Common School Act that no rate can legally be imposed for paying the salary of an unqualified teacher. Such a teacher cannot be allowed to receive any portion of the school fund, and the 15th section of the statute provides that no teacher shall be deemed to be a qualified teacher who shall not at the time of his engagement, and of his applying for payment, hold a certificate of qualification.

Thus it is clear that not only are contracts with uncertified teachers unenforceable, and quantum meruit recovery denied, but also the boards are not permitted to use public money to pay the salary of such a person.

In Alberta, the findings of the courts on this question have been written into the statutes. A clause in The School Act reads:²⁴

A person who is not qualified under this section (does not hold a permanent or temporary certificate of qualification issued by the Minister) is not entitled to recover in a court of law any remuneration for his services as a teacher.

The question of whether a teacher must possess a certificate of qualification at the time a contract is entered into, or whether it is sufficient to possess such a certificate at the time employment actually begins, has come before the courts, but the findings are not clear cut.

Only one Canadian case,²⁵ Somers v. Liberty School District, touches upon this matter and then only as a secondary issue in the case. In seeking to show why they should not be liable in an action for payment

²³(1857) 14 U.C.Q.B., 743 (C.A.)

²⁴R.S.A. 1955, c.297, s.331 (3).

²⁵[1928] 1 W.W.R. 884 [1928] 2 D.L.R. 334 (Alta.)

of salary in full in a termination of contract case, the school board offered as justification for their position the allegation that they had been deceived by the plaintiff. They said that she had represented to them in a letter of application for the position of teacher in the district her anticipation of receiving a second class certificate by the end of June. Due to illness she did not qualify for a second class certificate, but did so for a third class, which conformed to the requirements of The School Act. The board accepted her, knowing that she possessed only the third class certificate. The judge held that such anticipation of certification did not constitute grounds for refusal to pay salary in full, and awarded the full claim to the plaintiff. However, the judge cited other and more primary reasons for the award, leaving some doubt as to how such a question would stand up on its own.

American courts disagree on the question. In Jenness v. School District,²⁶ and in Putnam v. School Town of Irvington,²⁷ the courts ruled that despite the fact that the teachers involved were in possession of certificates when school opened in September, the fact that they had not possessed certification at the time the contracts were entered into made recovery of salary impossible. In a later case,²⁸ however, Crabb v. School District, a teacher sued to recover

²⁶12 Minn. 448 (1867) (Decided by the Supreme Court of Minnesota.)

²⁷69 Ind. 80 (1879) (Decided by the Supreme Court of Indiana.)

²⁸93 Mo. App. 254 (1902) (Decided by the Kansas City, Mo., Court of Appeals.)

salary in an instance where lack of certificate was the alleged point at issue. At the time of contracting the teacher did not hold a valid certificate, nor did she hold one at the time school opened. The day before school began she received a telegram from the state superintendent informing her that she would be granted a certificate. She did not, however, receive the state certificate until two days after school began. She presented herself at the school building, ready to go to work, the day school opened, but another teacher had been hired to take her place. She then brought action to recover salary. Broaddus, J., in summing up stated:

We do not think, taking sections 8021 and 8022 (R.S.Mo. 1889) to be used together, they mean that the teacher must have a certificate of qualification at the time of making a contract to teach school in the future. The object of the statute is that the qualification may exist during the term of the employment. The language of the statute is that "no teacher shall be employed," and has reference to the employment and not to the contract for employment.

An Alberta instance²⁹ shows the other side of the coin. A teacher from outside the province accepted a position under a school board and subsequently resigned the position without giving proper notice. He claimed that because he had not applied for an Alberta certificate and in fact did not have one at the time of employment, he was not bound to observe the contract. The school board elected not to fight the case and gave him his release.

Notwithstanding the ambiguity of court findings, the practice all across Canada is for beginning teachers to negotiate contracts

²⁹Interview with F.J.C.Seymour, Assistant Secretary, A.T.A.

during the closing months of their training period on the expectation that they will have acquired a certificate of qualification by the time classes open in September.

III. DEFINITION OF A TEACHER

The legal definition of a teacher, and the question of whether a teacher is a public officer or an employee, have important implications for the legal status of the Canadian teacher.

Legislation and Regulations

The following excerpts from school and education acts represent the statutory definition of a teacher.

British Columbia's definition is more extensive than some, and runs as follows:³⁰

"Teacher" means a person holding a valid and subsisting certificate of qualification issued by the Department of Education who is appointed or employed by a Board of School Trustees to give tuition or instruction or to administer or supervise instructional service in a public school but does not include a person to whom is issued a letter of permission for teaching.

Saskatchewan's statutory definition is brief:³¹

"Teacher" means a person holding a legal certificate of qualification.

In Manitoba the term "teacher" is more inclusive and does not distinguish between the qualified and the unqualified. It reads:³²

³⁰Public Schools Act, 1958, c.42, s.2 (1) (B.C.)

³¹The School Act, R.S.S. 1953, c.167, s.2 (18).

³²The Public Schools Act, R.S.M. 1954, c.215, s.2 (34).

. . . "teacher" means a person who holds a valid and subsisting teacher's certificate or a limited teaching permit issued under The Education Department Act, or who is authorized by the Minister to teach in a school.

The Ontario definition of a teacher makes no reference to qualifications but does distinguish among an occasional, a probationary, a temporary and a permanent teacher. The distinction is in relation to length of time employed rather than to qualifications.³³

The Education Act of Quebec³⁴ acknowledges the role of the ladies in the teaching profession. It reads:

The words "teacher" and "professor" include female teachers and all persons, lay or religious, teaching in virtue of this Act.

The Nova Scotia and Newfoundland Education Acts contain no definition of a teacher but in each case the acts incorporating the teacher organizations of the province contain such definitions. A Newfoundland grading regulation³⁵ distinguishes between a certificated teacher and a probationer.

A person who holds a probationer's licence or a person who does not hold a certificate of grade or licence, and who is engaged to teach by way of emergency supply, shall not be designated as a teacher, but as a probationer or emergency supply, as the case may be.

It should be pointed out that the word "probationer" in the sense used here refers, not to one who lacks sufficient teaching experience to qualify for a permanent certificate, or for tenure status, but to one

³³The Schools Administration Act, 1954, c.86, s. (g) (h) (j) (o) (Ont.)

³⁴R.S.Q. 1941, c.59, s.2 (14) as amended to March 1st, 1958.

³⁵Grading Regulations, Newfoundland Department of Education.

whose training falls short of the standard required for certification.

Cases

In a number of instances the courts have commented on the definition of a teacher. In particular, cases have centered around specialist teachers whose legal position tends to be less clearly defined than that of regular teachers. Several Quebec cases contain relevant comments. In Lafond v. Montreal Catholic School Commission³⁶ a physical education teacher was paid at a reduced salary, because he was instructing cadets and was receiving pay from Federal sources. He brought an action for the amount of the reduction, and also a claim for damages for the following year's salary, inasmuch as he was not notified in accordance with the Education Act, that his services would not be required the following year. In the ensuing action he was awarded the claim for the amount of reduction in his current salary, but failed in the claim for salary for the following year, on the grounds that, not being a teacher in the sense of the Act, he was not protected by the provisions of the Act. This point was made by Fortier, J.

Whereas . . . the plaintiff does not form a part of the teaching body, properly called, and whereas he is unable to consider that his engagement as a teacher must continue for the following year in the absence of a written notification from the school commission during the month of June of the current year, as a consequence he does not have the right to the additional sum which he claims from his employers.

³⁶(1939) 77 (Que.) S.C. 313.

In another and later instance, a case involving both the definition of a teacher and a question of tenure concluded differently.³⁷ Louis Chicoine, holder of a diploma from the Ministry of National Defense, and a certificate issued by the Superintendent of Public Instruction for the Province of Quebec, taught physical education during the period 1928-1936 for the Montreal Catholic School Commission. For reasons of economy, the teaching of this subject was discontinued from 1936 until 1948, at which time M. Chicoine was re-engaged following an exchange of communications with the Commission. In the absence of notice to the contrary, Chicoine assumed that he would continue to teach the following year, 1949-50. Upon presenting himself for employment in September he was informed that another man had been engaged in his place. Chicoine then sued the Commission for his salary of \$1,200 and the Commission, in defense, claimed that according to law the plaintiff was not a teacher, and had not in any case signed a contract of employment. The Court found for the plaintiff both on the question of status of his certification and on the question of tenure. In so finding, the court pointed out that the exchange of letters between the disputing parties did constitute a contract and that in any case it was incumbent upon school boards to engage teachers through written contracts and that failure to do so would not necessarily reflect on the teachers who offered their services.

Referring to the plaintiff's status as a teacher, Bissonette, J.

³⁷Commissionnaires d'Ecole d'Outremont v. Chicoine [1954] R.L. 376 (C.A.)

commented as follows:

The plaintiff, having obtained a special diploma from the Superintendent, profits by the exception stated in Art. 68, and he had as a consequence, a letter of authority permitting him to be engaged as a teacher.

Finally, if the special diploma of the Superintendent gives to the holder the same quality as if he had obtained a regular certificate, it follows, perforce, that the special diploma attributes the aptitude of teaching and that its holder is a teacher.

[Article 68 recognizes diplomas obtained "in virtue of some provision of this Act" - Education Act, R.S.Q., 1941, c.59, s.68]

A further case³⁸ involving the definition of a teacher concerns the status of a superintendent or a supervisor of study. A person to play such a role was appointed by the Commissioners of the City of Hull. He was classified as a superintendent of study, in the resolution of employment passed by the Commission. He entered upon his duties in September 1933 and in May, 1934, was re-engaged for a further period, namely the school year 1934-35. His salary was set at \$100 per month including July and August, during which time he was to organize his promotions, prepare examinations, etc. In July, the membership of the School Commission was changed through election, and one result was that Mr. Mailly was dismissed as of September 1st. As has been indicated earlier, s. 232 of The Education Act (Quebec) provides that if a school board decides not to re-engage a teacher for the following year, it must notify such teacher prior to the first of June preceding. Mailly sued for damages, but his suit was rejected by the Superior Court. On

³⁸ Mailly v. Hull School Commissioners (1937) 62 Que. K.B. 278 (C.A.)

appeal to King's Bench, the judgment was reversed. It was pointed out that The Education Act draws no distinction between "teacher and "special teacher", that it expressly includes all persons "teaching in virtue of the Act," and it was held that the appellant was indeed a "teacher" in the sense of the law and that therefore the procedures regarding dismissal would apply to him. These having not been observed by the Commission, the appellant was entitled to damages. In his judgment, Bond, J., referred to Reilly v. Protestant School Commissioners of Lachine³⁹ in which it was held:

A school teacher who has been promoted to the post of Principal of a High School, and the Superintendent of Schools, and has ceased to have classes, does not thereby cease to be a school teacher and his salary is unseizable.

In an English case, the court declared that the rights of a public officer are not common law rights but are those provided by a particular statute.⁴⁰

Another facet of the definition question concerns whether a teacher may be defined as a public officer or an employee. If he were a public officer, certain rights would accrue to him, whereas if he were classified as an employee, the master-servant relationship would take on legal significance. This matter is touched upon in a number of cases which have come before the courts, usually in connection with dismissal or termination of tenure. Going back to 1887, an Ontario judge ruled

³⁹(1930) 33 Q.P.R. 265.

⁴⁰Capel v. Child (1832) 2 Cr. and J. 558 E.R. 235.

that the school board's right to dismiss a teacher arises from the relation of the parties, as master and servant, employer and person employed.⁴¹ In this instance plaintiff was appealing from a County Court judgment, basing his appeal on the grounds that dismissal during the year can take place only upon the action of an inspector in suspending the teacher's certificate as he was empowered to do by the Act. The Act provided that a certificate entitled a holder to teach in a public school, that the inspector might suspend the certificate of any teacher for cause and that if the teacher wilfully neglected to carry out his agreement at common law with the trustees, he would on complaint of the trustees be liable to have his certificate suspended by the inspector. The judge held that unless the Legislature had expressly or by direct intendment taken away the right of dismissal, "we should hold it necessarily to arise from the relation of parties as master and servant, employer and employed." He referred to Fletcher v. Knell 42 L.J.Q.B. 56 and a statement by Blackburn, J.

If a servant turns out to be unfit for his duties he may be discharged, but if he is able and willing to perform his duties he may enforce the contract of service except where he has been guilty of moral fraud.

In Lacarte v. Board of Education of Toronto,⁴² the judge held that

. . . under relevant Ontario statutes a high school teacher employed by a School Board is in a contractual relationship with the board and does not hold a public office so as to enjoy tenure terminable after a hearing.

This position is supported by Halsbury's Laws of England.⁴³

⁴¹Raymond v. Cardinal School Trustees (1887) 140 A.R. 562.

⁴²(1959) S.C.R. 465, 17 D.L.R. (2d) 609 affirming [1956] O.W.N. 844

⁴³Viscount Hailsham, ed., Halsbury's Laws of England, 2nd Ed., Vol.12 (London: Butterworth & Co. (Publishers) Ltd., 1934), p.137.

The contract of employment between teachers and those who appoint them does not involve any principle different from other cases of the relation of master and servant.

And again in Lacarte v. Board of Education of Toronto the words of Aylesworth, J.:

A teacher is not a public officer within the meaning of those terms at common law. Appellant was an employee of respondent pursuant to a contract. Respondent was the master and appellant the servant.

A comment by Garber and Edwards indicates that while the legal distinction between a public officer and an employee seems to be clear, the question as to who in education belongs in which category remains in doubt. Their comment follows:⁴⁴

Teachers perform a governmental function, but they are not public officers; they are employees of the board of education for whom they work. As a rule, city superintendents are held to be employees also, but in some instances the courts have held that they are public officers. This is in part due to the fact that the distinction between "employees" and officers is not always clear, although the courts recognize certain differences between them.

Although the question of designation to administrative positions bears a relationship to the definition of a teacher, it will not be discussed further under the present heading, but will be considered in the chapter dealing with tenure.

IV. APPOINTMENT AND TRANSFER

Appointment

There are many factors to consider in assessing the legal status

⁴⁴Garber and Edwards, op.cit., p.3.

of teachers with respect to appointment to positions of employment. Among these are (1) proper authorization, (2) the manner in which appointments are made, (3) the question of a written or unwritten contract, (4) conditions under which a contract is enforceable, (5) distinction between a contract of employment and a collective agreement. These and other factors make the question of the appointment of teachers a complex one insofar as the law is concerned.

Authorization

The authority to appoint teachers originates in the legislature. One of the powers delegated to school boards by the legislature is the power to appoint and designate teachers. The manner in which this is to be done is spelled out in fairly general terms either in the legislation or in Department of Education regulations. As the following excerpts indicate, these procedures are similar in substance from province to province.

In Alberta the procedures are spelled out in the Act itself⁴⁵ and involve an offer of employment to the teacher by the secretary of the board and acceptance of the offer by the teacher on or before the eighth day following the date of the offer. Within four days after the receipt of the teacher's statement of acceptance the secretary shall send him a notification that he is under contract to the board and the teacher shall be deemed to be under contract from the date of notification. A subsequent clause provides that the functions that may be performed by

⁴⁵The School Act, R.S.A. 1955, c.297, s.332 and 334.

the secretary of the board may be delegated to the superintendent by a resolution of the board.

Provisions for the engagement of teachers by school boards in Saskatchewan are contained in The School Act and are very similar to those outlined for Alberta. An additional clause⁴⁶ is significant.

A teacher shall not be engaged or dismissed except under the authority of a resolution of the board passed at a regular or special meeting.

In British Columbia appointment provisions⁴⁷ are contained in the Rules of the Council of Public Instruction. They are similar to those listed above, but stipulate as well

1) that a verbal acceptance of an offer of appointment shall be final and binding upon the Board of School Trustees and the teacher and

2) that a Board of School Trustees shall confirm in writing to a teacher any verbal offer of appointment by mail within forty-eight hours.

The provisions⁴⁸ contained in the Regulations pursuant to the New Brunswick Schools Act are much less detailed. They read as follows:

Each teacher and licensed assistant, before entering on duty in any district, shall make a written agreement with the board of school trustees (each party retaining a duly executed copy of the same) in accordance with the approved form found in the school register.

While statutory provisions constitute the general authority for

⁴⁶R.S.S. 1953, c.169, s.214.

⁴⁷Manual of School Law, Province of B.C. Rules of the Council of Public Instruction, s. 11 and 13, p.8.

⁴⁸New Brunswick Schools Act Regulations, Reg. 6, p.6.

the appointment of teachers, the interpretation of these provisions has fallen to the courts on a number of occasions. Proper authorization of appointment involves, depending upon the legislative provisions, the holding of a proper meeting with notice given as prescribed, a quorum present, minutes kept, proper motions or resolutions put, etc. It also involves adherence to the statutes as regards procedure, including use of the corporate seal, written or unwritten contracts, formal contracts, whether legislation is being complied with, whether or not a meeting need be called or whether ratification of an appointment by a board is necessary. Finally the question of whether statutory provisions were imperative or directory has been considered.

Cases

For the most part, cases concerning proper authorization turn on whether or not the statutes have been complied with. In turn, compliance may depend upon whether the governing statute is imperative or merely directory. A number of such cases deal with the question of whether or not a contract between a teacher and board requires a seal in order to be valid.

In Birmingham v. Hungerford et al,⁴⁹ Hungerford, a bailiff, had seized property of the school board in order to fulfill the contract and to pay the salary of the teacher who had been dismissed. Birmingham, the secretary of the trustees, brought an action against Hungerford, alleging that the contract with the teacher was void for want of the

⁴⁹(1869) 19 U.C.C.P. 411.

seal of the corporation. Counsel for the plaintiff cited 23 Vict. c.49 which reads:

All agreements between trustees and teachers, to be valid and binding shall be in writing, signed by both parties thereto, and sealed with the corporation's seal.

Referring to this clause in his judgment, Hagarty, C.J., said

If we attach any meaning to the clause, we think it must be that a person can only become a common school teacher by agreement under seal, and that any other agreement, verbal or written, would not be an agreement for that purpose with the corporation.

The judge went on to say:

The moment it is settled that no agreement can be made except in the prescribed manner (i.e. under seal) there is nothing to bind the corporation in any matter or dispute between them and a teacher. No person has required status as a teacher.

The court found for Birmingham.

In a later case, Young v. The Corporation of Leamington,⁵⁰

Lindly, L.J., was at some pains to say why a corporate seal is necessary:

The object of requiring such contracts to be under common seal is, I apprehend, to draw the attention of the corporation, i.e. of its managing body, to each particular contract and to ensure, if not the examination and discussion, at all events an opportunity for the examination and discussion of the terms and provisions in detail of every contract by which the corporation is to be bound. This object would be entirely defeated if it were to be held that a contract, not under seal, entered into by an agent, appointed under seal, was a contract under seal within the true meaning of the statute which governs the case.

Although this latter case did not concern teachers or school boards, the point of law involved was the proper use of the corporate seal on a contract.

⁵⁰(1882) 8 Q.B.D., 579, affirmed (1883) 8 App. Cas. 517.

Both cases were cited in McMurray v. East Nissouri Public School Board,⁵¹ where once again lack of a corporate seal rendered a contract void. In this case an action for alleged wrongful dismissal was dismissed by the court on the basis of the statutes, Public Schools Act 1 Edw.VII, c.39, s.81(1) which provided:

All agreements between trustees and teachers shall be in writing, signed by the parties thereto, and shall be sealed with the seal of the corporation.

Counsel for the plaintiff argued that such a provision was directory only, but the judge ruled that it was imperative and supported the trustees. While doing his judicial duty thus, he expressed his displeasure with the behavior of the trustees by telling them it was unmeritorious, and they were left to pay their own costs.

In Alexander v. Bathurst and Beresford School Trustees,⁵² the validity of a teacher's contract was established, despite the lack of a corporate seal on the contract. At the trial, counsel for the defendant cited a regulation by the Board of Education of New Brunswick which required that a teacher's contract be under corporate seal. Counsel for the plaintiff referred to The Common Schools Act, C.S.N.B. 1877 c.65, s.74 (3), which provided for trustees to conclude contracts in writing but did not mention the need for a seal. He went on to cite The Corporations Act, C.S.N.B., 1877, c.98, s.4, which indicates that

⁵¹(1910) 21 O.L.R. 46 (C.A.)

⁵²(1891) 30 N.B.R. 597 (C.A.)

. . . the contract of the agent of any corporation within the scope of his authority, and the acts of a corporation, shall be valid, though not authenticated by their seal.

His final point was that since by The Common School Act a school board is a corporation, it should follow that a seal would not be necessary to validate the teacher's contract. The judge found in favor of the teacher, saying that he felt the Board of Education exceeded its powers when it declared that the corporate seal of the Trustees was necessary to the validity of the contract with the teacher. He found the regulation of the Board to be in direct conflict with s.4 of The Corporations Act, and that the latter must prevail. Thus, while The Common Schools Act might be termed a special statute covering a related subject and would therefore be expected to prevail over a statute of general application, viz. The Corporations Act, in this instance it was a question of a general statute prevailing over a regulation pursuant to a particular statute.⁵³

In a subsequent case,⁵⁴ Sparling v. Spring Coulee School Trustees, an action for damages for dismissal without notice, contrary to the terms of the alleged agreement of hiring, was dismissed. The defendant board set up, among other things, the invalidity of the agreement which did not appear to have been adopted by the board as required by the statute, this in spite of the fact that the agreement

⁵³Cf. State v. McGill, 61 N.W. (2d) 494, 265 Wis.336. Quoted in Leo O. Garber, The Yearbook of School Law 1955, p.57. In this case it was held that a tenure law, not general but special in nature, takes precedence over a general law concerned with the same subject.

⁵⁴(1900) 4 Terr. L.R.366 (N.W.T.)

was under the seal of the corporation. The controlling statute contained the imperative word "shall" with respect to meeting procedure, and inasmuch as this procedure was not followed, the contract was void.

A further case concerning procedure of this type illustrates the nature of the court's interpretive powers. In Macpherson v. Usborne School Trustees,⁵⁵ a school board's defense in an action by a teacher against alleged unjust dismissal was said to lie in a clause of The Public School Act, R.S.O. 1897, c.292, s.19, which runs as follows:

No act or proceeding of a rural school corporation which is not adopted at a regular or special meeting at which at least 2 trustees are present shall be valid or binding on any person, unless notice of such meeting has been given to the trustees by the secretary . . . either personally or in writing, and a minute of such act or proceeding is made in writing and signed by 2 of the trustees. 59 V.C., c.70, s.19.

The trustees claimed that the absence of a formal minute of the proceedings of the meeting at which the contract was approved was enough to render it void. This despite the fact that the contract was signed by all the trustees. Meredith, C.J., in his judgment in the Appeal Court made a comment that was to govern subsequent cases.

The agreement being valid upon its face, and one that has been acted upon for several years, the onus of proving its invalidity by reason of anything for which s.19 provides not having been done, was upon the appellants (the trustees) and that onus, in my opinion, they failed to satisfy. It is reasonable to infer that the agreement, which was signed by all the trustees, was signed at a meeting at which all were present, and it would be an extraordinary condition of the law if, where all trustees had met and come to an agreement with a teacher and the agreement had been duly executed, it must be held to be invalid merely because the trustees had not made, and the majority of them signed a minute of what had been done.

⁵⁵(1901) 1 O.L.R. 261 (C.A.)

This judgment was followed in Gliddon v. Yarmouth Public School Trustees,⁵⁶ where lack of minutes was offered in defense against action by the teacher concerning improper dismissal.

There is a distinction between not having a formal minute to support a contract which on the fact of it has the approval of all the trustees, and having a contract where no formal vote was taken on it at the meeting. In Wardrop v. Whitemouth School District,⁵⁷ such a vote was not taken and the judge rejected evidence that the chairman and secretary were warranted in inferring that the majority assented to the meeting. The Public Schools Act (Manitoba) 1930, c.34, s.107, reads:

No act or proceeding of a rural school corporation which is not adopted at a . . . meeting of the trustees shall be valid or binding on any person affected thereby, and if adopted at a . . . meeting of the trustees, not unless all the trustees were present . . . or notice had been given as required by this Act, and at least a majority of the trustees were present at such meeting.

Whether or not a formal meeting must be held in order to have a valid contract depends upon the specificity of the legislation.

Sparling v. Spring Coulee Trustees has already been cited. Two further cases, substantially similar in fact, resulted in opposing judgments.

In Johnson v. MacEwen School Trustees,⁵⁸ it was concluded that an alleged contract based upon correspondence between the teacher and the secretary-treasurer of the board was unenforceable. The Alberta

⁵⁶ (1908) 17 O.L.R. 343 (C.A.)

⁵⁷ (1931) 3 W.W.R. 499, 40 Man. R. 1 (1931) 4 D.L.R. 861 (C.A.)

⁵⁸ (1922) 3 W.W.R. 1166, 19 Alta. L.R. 44 (1923) 1 D.L.R. 175 (C.A.). Cf. Smith v. School District 1 Pen. 401 (Del.) 42 A368 (1898). (Decided by the Supreme Court of Delaware.)

School Ordinance required that where a board of trustees employs a teacher (1) there shall be a formal contract in writing, (2) the particular person to be employed shall be decided by resolution of the board.

Held: A teacher is bound to take notice of these requirements, and can make no claim for damages under an alleged contract, purely executory, based merely on correspondence between such teacher and the secretary-treasurer of the school district. Such correspondence must be considered as having been conducted upon an understanding of what the law is, and upon the implied understanding that to reach a finally binding contract the provisions of the Ordinance must be complied with. In such circumstances, the teacher being bound to be aware of the extent of authority of the secretary-treasurer, cannot claim, against such an official, damages for a breach of an implied warranty of authority.

A New Brunswick case of a substantially similar nature resulted in a judgment in favor of the teacher. In MacDonald v. Eldon School Trustees,⁵⁹ one Elsie MacDonald applied for the position of teacher in Eldon district. Her application was considered favorably by two of the trustees, meeting informally. Their views were made known to the third member of the Board of Trustees, again informally. He demurred at accepting the application and suggested that no decision be made until the school meeting was held. The other two, however, decided to engage Miss MacDonald and so informed her by letter. In the meantime the school meeting was held, and one of the two trustees favoring Miss MacDonald's engagement was replaced, as his term had expired. The new trustee, in concert with Trustee Murray, who had opposed the appointment

⁵⁹(1929) 1 M.P.R. 243, (N.B.C.A.)

of Miss MacDonald, re-advertised the position and engaged another teacher, without notifying Miss MacDonald of this decision. She brought action against them, having presented herself for duty on the first of September and having been refused admission to the school building. Johnson v. MacEwen School District was cited, but it was felt that whereas Alberta legislation, s. 150 of The School Act, required an official meeting and resolution of the board, the New Brunswick School Act was more elastic. Moreover, it was pointed out that in the MacEwen case no contract existed because no offer had been made by the school board. In dismissing the appeal by the Board of Trustees against a judgment of damages for the teacher, Grimmer, J., concluded:

In my opinion, the Board of School Trustees, with full knowledge of the contract that had been made with the plaintiff and which was duly signed by one trustee and the plaintiff, on the form prescribed by the Board of Education, purposely and deliberately violated it, the plaintiff being ready and willing to and having done all that she could reasonably be expected to do to carry out her portion thereof, and the judgment in her favor should be sustained and the appeal dismissed with costs.

The findings of a Board of Reference⁶⁰ held recently in Saskatchewan indicate that procedure regarding the calling of meetings may still be of crucial significance in determining whether or not a contract is valid. A teacher was dismissed upon resolution of a Board at a meeting, notice for which meeting was not properly given. The legislation (The Larger School Units Act) provides that whereas regular meetings of the board may be held without notice having to be

⁶⁰"School Boards in Court," The Saskatchewan School Trustees' Journal, March, 1964, pp. 7,8.

given, in the case of special meetings, either six clear days' notice shall be given to all members of the board, or notice may be waived by unanimous consent. In the instance referred to, only five of the six trustees were notified and signed the formal waiver notice. The finding of the Board of Reference was to the effect that the meeting, being improperly called, could not legally act. Consequently the teacher's dismissal was revoked. In arriving at its judgment, the Board of Reference cited the case of Waterman-Waterbury Manufacturing Company v. Slavanka School District. While the contract in this case was a commercial contract between a school board and a business firm, rather than a contract of employment, the point of law at issue and upon which the findings turned, was the same. This point is stated in the headnote to the case.⁶¹

A school board being a creature of statute, a contract entered into by it is not valid and binding on it unless imperative provisions of the statute prescribing the conditions under which the powers of the board may be exercised are complied with, even though the contract has been executed in whole or in part.

It is interesting to note that the final decision of the Board of Reference was that the Trustees of Sturgis Unit No. 45 accept the teacher's resignation effective January 31st, 1964, without notice and without loss of pay to that date.

One might question the propriety of a Board of Reference making such a recommendation in view of the findings it had arrived at. The Board had power to bind both parties to a contract for the remainder

⁶¹(1929) 1 W.W.R. 598.

of the year. The fact that it did not choose to do so, and that both parties elected to accept the recommendations it did make constitute evidence that a Board of Reference may stray from its terms of reference provided there is no challenge made.

While the list of cases cited is not an exhaustive one, one might be justified in inferring that in the main, contracts must be drawn up as provided by statute, especially where such provisions are seen to be imperative. It is also evident, however, that the courts may exercise discretion in instances where compliance is substantial, even though technicalities may not have been observed. A provision of The School Act of Saskatchewan commits this principle to legislation. It is designed to afford a measure of protection to teachers in the event of irregularities attendant upon appointment. S.216 (f) reads:⁶²

Notwithstanding s.214, insufficiency of notice or other irregularity in calling a meeting of the board at which a teacher is engaged, or irregularity in the proceedings at such meeting, or neglect or omission of the board to comply with any of the provisions of section 215 or to have the contract duly executed as required by s. 216c shall not disentitle the teacher to recover any salary or remuneration due to him.

Thus while irregularities in board meeting procedure may be cited by a teacher in defense of tenure, they may not be used by a school board as a basis for denying salary due a teacher.

To conclude this discussion on the making of appointments, points of law covered in two cases are of some significance. The one point is that provisions of the statutes constitute part of the contract whether

⁶²R.S.S. 1953, c.169, s.216 (f). Cf. The Public Schools Act, R.S.M. 1954, s.263 (4).

this is implied on the face of the contract or not. Dedrick, in making this point, cites a Pennsylvania case.⁶³ While the issue in this case is one concerning tenure, the point of law is pertinent to the present discussion. In 1937 it became evident that the Pennsylvania legislature was going to pass a tenure law. In anticipation of this, many school boards notified teachers that they would be released at the end of the term. The statute, when adopted, provided that no teacher's contract in effect on April 6th, 1937, could be terminated except for stated reasons. In granting a writ of mandamus to compel the restoration to his position of a teacher so discharged, the court pointed out that the legislature had merely substituted new contracts for those in existence on the effective date of the act. Since the teacher had been working under a contract on the effective date of the act, the board was powerless to discharge the employee except in a manner permitted by the statute.

The second case⁶⁴ is of Canadian origin. In Hayes v. Loyola School District, a teacher had concluded an agreement regarding the manner in which her salary was to be computed. When the contract into which this agreement was written was terminated by mutual consent, a dispute arose as to interpretation of the agreement. The board overpaid the teacher and in an action to secure restitution it cited

⁶³ Malone v. Hayden, 329 Pa. 213, 197A 344. Quoted in D.W. Dedrick, "The Common Law Status of Teachers' Contracts of Employment," (unpublished doctoral dissertation, University of Connecticut, 1955) (Microfilm.)

⁶⁴ (1916) 34 W.L.R., 799 (Sask.)

a clause of The School Act (Sask.) 1 Edw. VII c.39, s.81 (1), which outlined the basis upon which salary was to be computed, with which clause the agreement was alleged to be in conflict. In finding in favor of the school board, the judge made his point clearly:

Neither teachers nor trustees may contract themselves out of provisions of The School Act (Sask.), and any term in such a contract which is inconsistent with any provision of the Act will be void.

It is quite clear from this case that even where both parties agree, it is illegal for parties to a contract to include clauses which are at variance with the provisions of the governing statute.

Kemper's conclusions in his study⁶⁵ on the common law principles of teacher contracts seem relevant. They are in part as follows:

The study revealed that the courts in reaching their decisions, followed strict construction of the statutes. The courts also made a decided attempt to determine the legislative intent when solving issues revolving around ambiguity of statutes or when direct reference to statutes could not be made. Decisions of school officials were upheld when statutory enactments were silent on the issues, unless the decisions were arbitrary or in abuse of discretion.

Collective Agreements

The advent of teacher organizations acting either directly or through their locals as bargaining agents for teachers has led to a distinction between contracts of employment and the salary, working conditions, etc., under which such contracts are carried out. The

⁶⁵H.E.Kemper, "Legal Issues Involved in the Construction, Operation, and Performance or Breach of Teacher Contracts," (unpublished doctoral dissertation, University of Pittsburgh, 1954), p. 136. (Microfilm.)

contract of employment is negotiated between the individual teacher and the board. Breaking of such a contract may be dealt with by one of two quasi-judicial bodies. If the teacher is alleged to be at fault the board may lay a charge before the discipline committee of unprofessional conduct against the teacher, whereupon the teacher organization may institute proceedings by a discipline or professional committee. If the board is alleged to be at fault, the teacher may seek a board of reference hearing to determine the rights of the case.

The collective agreement, covering salary, conditions of work, and associated welfare aspects, is negotiated between locals of the teacher organizations and school boards, and in instances where such agreements are alleged to have been broken, provision is made for hearing of grievances. Further consideration is given to the role and function of conciliation and arbitration boards in a subsequent chapter.⁶⁶

A Manitoba case⁶⁷ sheds light upon the plight of a teacher who failed to negotiate an agreement with a school board concerning extra duties she undertook. A domestic science teacher, she agreed by correspondence to teach for the school board. No agreement was at any time entered into, signed by the parties, or sealed with the corporate seal of the board of trustees. Later she taught extra classes for about two hours per day, but no extra remuneration was

⁶⁶Infra, Chapter V.

⁶⁷Garrow v. Brandon S.D. [1923] 3 W.W.R. 442 (Man.)

given her. The board passed a resolution that her claim for over-time be not entertained. She then brought an action to recover extra remuneration for this extra work. In handing down the decision of the court the judge made the following statement:

In my opinion, the meaning of s.150 (of The School Act) with its introductory words is this--that except in so far as s.151 gives some effect to a different kind of agreement, no agreement not under corporate seal and signed by the parties is of any validity whatever. I think this is clear and if any injustice does arise or may arise out of so reading the sections, the abatement of the injustice is a matter for legislators and not for the court. But even if this were not so, what is the position? s.150 is the main enactment, it lays down a general rule, s.151 introduces an exception from the generality of the other, it is in the working out of the exception that the injustice arises, and in my opinion if one of the sections has to give way, it is s.151.

While such a case could arise in 1923, the likelihood of a recurrence at the present time is sharply reduced by the fact that in most situations today, provision for remuneration for all work done would be included in the collective agreement negotiated by the local branch of the teachers' organization.

Transfer of Teachers

Whereas school boards have distinct limitations imposed upon them by law concerning the appointment of teachers, the negotiating of contracts, and the termination of contracts, and while these limitations and provisions vary from province to province, school boards generally have the right to transfer teachers from one school to another within the system over which they have jurisdiction. An excerpt from the Public Schools Act of British Columbia sets out the

conditions under which transfer powers may be exercised by a school board in that province.⁶⁸

s.129 The Board of a school district may . . . (e) Authorize the transfer at any time of any teacher employed in any public school in the school district to any other public school in the school district, and in the event of any such authorization

(i) the transfer shall be effected by notifying the teacher, in writing, of his transfer, stating the reasons for the transfer and the date on which the transfer is to take effect;

(ii) if the salary of the teacher is to be decreased by the transfer, then notwithstanding anything contained in Division 2 of this Part, the Board may adjust the salary of the teacher only at the beginning of the next school year;

(iii) the transfer shall be made only after consultation with the District Superintendent of Schools;

(f) authorize the transfer of a teacher to be effective at the close of or at the beginning of a school term without stating the reason for the transfer; but where the salary of the teacher in his new position is not less than it would have been had the teacher not been transferred, the transfer is not subject to appeal . . . but may be reviewed by the Superintendent of Education, and his decision shall be binding upon the Board and upon the teacher.

Alberta provisions are similar to those obtaining in British Columbia with two additional clauses to be noted:⁶⁹

The board shall not under this section (The School Act, s.348) transfer a teacher who has been designated to be a principal, vice-principal, or assistant principal under s.370.

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The board of a division may pay all or part of the expenses necessarily incurred by a teacher in moving himself, his family and his personal and household effects as a result of a transfer from one school to another within a division.

There have been few instances of transfer or reassignment cases coming before the courts. The tenor of the judgments in a number of American cases is that boards may transfer freely provided they act

⁶⁸1958, c.42, s.129 (B.C.)

⁶⁹R.S.A. 1955, c.297, s. 348, 349.

reasonably and provided such transfer is not considered to be a major demotion.⁷⁰ The only Canadian case discovered which touches on this issue is Re Clarke and Board of Education of Toronto.⁷¹ In this instance, Clarke, the principal of a Collegiate Institute, was assigned teaching duties at another Institute. A Board of Reference found such a transfer not to constitute a dismissal. This finding was affirmed by the court.

It would seem that the school board's power to transfer teachers within the system is clearly established, provided that in so doing it is neither arbitrary, capricious nor unreasonable.

V. SUMMARY

In order to teach in a Canadian public school, it is necessary to have a certificate of qualification issued under the authority of the Minister of Education of the province concerned, whether such certificate be permanent or temporary in nature, and whether it be classified as a professional certificate, a licence, a letter of standing, or a letter of authority.

While not a contract, the possession of a certificate is a condition of employment. A person teaching without a certificate,

⁷⁰Kacour v. Board of School Trustees of South Whittier S.D., 18 Calif. (2d) 586; Hodge v. Board of Education, 22 Calif. App. 341; and State ex. rel. McNeil v. Avoyelles Parish S.D., 199 La. 859, 7 So. (2d) 165. Quoted in Newton Edwards, The Courts and the Public Schools, p. 469.

⁷¹(1942) O.W.N. 878 (C.A.)

licence, or letter of authority, will be considered by the courts as being only a volunteer, and not eligible for recovery of salary under quantum meruit. This is made clear both in legislation and in court findings. It is not clear, however, whether a teacher must possess a certificate at the time of engagement or only at the commencement of employment. This issue has been before United States courts on a number of occasions with conflicting results. While it has not come before a Canadian Court, general practice seems to be to consider certification at the beginning of the period of employment adequate compliance.

In the various education and teaching profession acts a teacher is defined as one who holds a valid or legal teaching certificate. In defining a teacher the courts have on a number of occasions tended to interpret the definition broadly.⁷² Both the legislation and court interpretation make it quite clear that a certificate of qualification is not a contract between the teacher and the issuing authority. It is rather a privilege extended by the state which can be withdrawn by the state.

There are two major types of agreement of employment between teachers and school boards. The one concerns conditions of employment, salary, etc., and is a collective agreement negotiated by the bargaining

⁷²Cf. Commissionaires d'Ecole d'Outremont v. Chicoin [1954] R.L. 376 (C.A.), Mailly v. Hull School Commissioners (1937) 62 Que. K.B. 278 (C.A.), and Reilly v. Protestant School Commissioners Lachine, 33 Q.P.R. 265.

agents or representatives of the teachers. The other, as a contract of employment, relates to the appointment of a teacher to a teaching position. A number of points of law enter into the making of a valid appointment. The appointment must be confirmed at a duly organized meeting of the school board. There must be a contract of employment between board and teacher. Whether such contract is written or oral, the relationship between teacher and board is contractual. The terms of the contract must not be in conflict with legislation.

A recent Saskatchewan Board of Reference case⁷³ is of interest, in that a court case⁷⁴ was cited to support a teacher's claim that the meeting at which her contract was terminated had not been legally called. While such court findings are not binding upon a Board of Reference, their use in a Board of Reference case would seem to be significant.

Contracts of employment and collective agreements are negotiated separately, the former by the individual teacher, the latter by the teachers' professional organization.

School boards have the power granted by statute to transfer teachers freely within the school system, and while the conditions under which transfers may be made vary in detail from province to province, the basic right to transfer is unequivocal. In general, if a transfer results in the teacher moving to a lower salary bracket, a reduction in salary can take place only at the beginning of the school year following

⁷³"School Boards in Court," The Saskatchewan School Trustees' Journal, March, 1964, p.7.

⁷⁴Waterman-Waterbury v. Slavanka School District (1929) 1 W.W.R., 598.

the year in which the transfer was made.

Recourse to the courts in matters relating to certification, appointment, contract, and transfer has rarely been had in recent years. One can only infer that the reasons may be (1) collective bargaining has removed many of the sources of potential dispute from the area of individual lawsuit, (2) quasi-judicial bodies have assumed some of the burden of settling disputes. One might further speculate that both teachers and trustees, through their respective organizations, are better informed regarding the legal boundaries within which contracts can be negotiated and appointments made.

CHAPTER V

THE LEGAL STATUS OF THE TEACHER REGARDING COLLECTIVE BARGAINING

I. INTRODUCTION

While questions relating to certification, appointment to teaching positions, and transfer of teachers from one position to another, are primarily applicable to individual teachers as such, matters relating to salary and conditions of employment are for the most part subject to collective agreement and action. In the present chapter consideration is given to some of the salient characteristics of the collective bargaining procedure as it is practised by teacher organizations in Canada. The purpose in doing so is to attempt to show how such practices affect the legal status of the Canadian teacher. The discussion is perforce in generalized terms, as any extensive study of collective bargaining by teachers would provide ample challenge for a thesis in itself. Rather, the present plan is to distinguish between negotiation of agreements, and settlement of grievances, and to attempt a brief rationale for the collective approach to bargaining with school boards. The statutory provisions are examined and comparisons and contrasts made. The basic contents of collective agreements are noted and reference made to limitations that legislation may impose.

Negotiation on a collective basis does not always culminate in ready agreement and as a consequence of this fact, provision has to be made to cope with disagreements and disputes. Such provision usually

takes the form of conciliation and/or arbitration proceedings. These are usually of a quasi-judicial nature, although care must be taken to distinguish between conciliation and arbitration, bearing in mind that conciliation is essentially an extension of negotiation, while arbitration is an adjudicating function. Attention is addressed to the matter of the composition of boards of conciliation, with emphasis on the question of partiality or bias. Special consideration is given to alternative forms of bargaining which enjoy a wide measure of success in some parts of Canada.

While the machinery of conciliation and arbitration disposes of most disputes, those few but significant cases which have resulted in court action are assessed. Finally, a comment is made respecting the rights of the individual in this essentially collective process.

II. COLLECTIVE BARGAINING OR PROFESSIONAL NEGOTIATION?

Before attempting to answer the above question, some definitions of terms are offered as a guide to understanding the use of these terms.

Definition and Clarification of Terms

Collective agreement means an agreement in writing between an employer or an employer's organization acting on behalf of an employer, on the one hand, and a bargaining agent of his employees, on behalf of the employees, on the other hand, containing terms or conditions of employment of employees including provisions with reference to rates of pay and hours of work.¹

¹The Industrial Relations and Disputes Investigation Act.
11-12 George VI. Statutes of Canada, c.54, s.2.

Collective bargaining means negotiating with a view to the conclusion of a collective agreement on the renewal or revision thereof, as the case may be.²

"Bargaining agent" means a group (teachers' organization or local thereof) that acts on behalf of employees in collective bargaining, or as a party to a collective agreement with their employer.

"Bargaining unit" means a group of teachers, usually all teachers working for a single board or for a number of boards, on whose behalf the bargaining agent negotiates.

A number of other points require clarification. A clear distinction must be drawn between conciliation and arbitration. In conciliation, whether it be done by a conciliation officer or by a conciliation board, the sole function of the conciliator is to bring the disputing parties to the negotiating table and to endeavor to bring about agreement between them.³ Conciliation is essentially an extension of negotiation. Arbitration, on the other hand, is an adjudicating function. The arbitrator is obliged to assess the question in dispute, consider the claims of the disputing parties, and arrive at a settlement of the dispute which is binding on both parties.

It is also necessary to distinguish between disputes that arise over the negotiation of a collective agreement and disputes that arise over its administration. Essentially, the one is concerned with the contents of the agreement, the other with interpretation and application

²Ibid.

³Ibid., s.32 (1).

of the agreement. Disputes over interpretation and application are known as "grievance disputes." Carrothers⁴ states that whereas compromise is often the essence of settlement of negotiation disputes, legal principles lie at the root of grievance disputes. Two characteristics of Canadian labor legislation, whether federal or provincial, are relevant: (1) Most collective bargaining statutes empower the parties to a dispute to convert a conciliation board into a board of arbitration by agreeing to be bound by the recommendations of the conciliation board in the same manner as parties are bound by an arbitration board. (2) Collective bargaining legislation also requires that there be machinery for settlement of grievance disputes without stoppage of work.

Prior to conciliation, parties may elect to be bound by findings, while arbitration of grievance disputes is compulsory, if the grievance cannot be ironed out by negotiation.

Rationale for Collective Bargaining

Three basic principles underlie the collective bargaining process. They are (1) the principle of collective or group action on the part of representatives to achieve a common goal; (2) the principle that such action shall be taken on the basis of mutually agreed upon rules and procedures; (3) the principle of third party mediation, conciliation or arbitration in the event that regular negotiations break down or

⁴A.W.R. Carrothers, Labor Arbitration in Canada (Toronto: Butterworth's, 1961), p.13.

result in deadlock. Each of these principles is accorded varying degrees of recognition and acceptance among teachers and their professional organizations.

It is by no means an uncommon practice for Canadians to look to the United States for ideas and for methods and patterns in the application of ideas or innovations. As noted later, American criteria for tenure legislation for teachers have received some attention in this country. This is not true of collective bargaining. Whereas in Canada collective bargaining is actively practised by almost all teachers' groups, American professional journals are still preoccupied with the primary question of whether or not collective bargaining per se is either desirable or in fact constitutional. An emphatic statement⁵ from the California Teachers' Association is rather startling.

No one is questioning the right of trade and industrial unions to collective bargaining. Its application to government, however, is illogical, inconsistent, unnecessary and dangerous to the public welfare. It is inconsistent for a legislative body to give its public employees 'collective bargaining' in order that the employees might then bargain for benefits which the legislative body may now grant to all such employees by law. The negotiated contract is incompatible with, and a poor substitute for existing uniform laws protecting public employees such as civil service, merit system, tenure laws, retirement programs, minimum salary laws, sick and bereavement leave, and other protections now written into law. Any authority granted to a state, county, municipality or district agency or administrator to reach a binding agreement regarding salary negotiations . . . and other benefits is an absolute interference with the process of constitutional government, removing legislative discretion from elected officers.

This quotation appeared in the editorial page of an issue of

⁵Quoted in "Collective Bargaining for Teachers?" Nation's Schools, Vol. 68, (July, 1961), pp. 41, 42.

Nation's Schools with no disagreement or disapproval on the part of the editor.

While the California Teachers' Association is affiliated with the National Education Association, it is doubtful if the National Education Association would subscribe in full to this position. There is evidence, however, that the National Education Association has little desire to be associated in the public eye with the kind of collective bargaining practised between labor unions and private industry.

National Education Association officials talk of professional negotiation in preference to collective bargaining. According to Martha Ware, Assistant Director of the National Education Association Research Division, professional negotiation procedures are characterized as follows:⁶

- 1) A provision for teachers' representatives and the board of education to meet and to express their views to each other;
- 2) Each, in good faith, listening to the views of the other and taking the other's views into consideration in coming to a decision; both negotiating problems on which they do not at first agree;
- 3) A provision to deal with an impasse, whether the impasse be caused by the board, or by the association, or by what seems to be the most obvious (but seldom mentioned) cause: the simple fact that the two honestly cannot agree.

⁶Martha Ware, "Professional Negotiation," N.E.A. Journal, November, 1962, p. 28 ff.

4) Final decisions jointly determined by the teachers' representatives and the board of education with, when necessary, the assistance of other educational agencies.

The emphasis in the National Education Association position is on confining the processes for settling disputes to educational channels. Such channels are to include mediation at the local level between teachers and school boards, at the state level between the same two groups, and if necessary, the participation of outside state educational officials. At no stage is there any question of arbitration or of strike power.

The crux of the National Education Association's opposition to collective bargaining under labor legislation and the body of precedent built up by the courts lies in their conviction that this legislation and this precedent were evolved and built up without teacher participation and because of this would tend to have developed procedures and practices inimical to professional interests. A further criticism is that formal collective bargaining would set administrator against teacher. As Allan West, another official of the National Education, said recently, "collective bargaining assumes an inevitable conflict of interest between teachers and school administrators."⁷ He further claimed that professional negotiation maintains the school administrator in the dual role of professional leader and school board executive while collective

⁷Allan M. West, "Professional Negotiation or Collective Bargaining," The National Elementary Principal, Vol. XLII, Number 4, (February, 1963), p. 23.

bargaining relegates the school administrator to the single role of "agent of management."

It should be by no means assumed, however, that collective bargaining as practised in industry is without its supporters in education circles in the United States. One of the most articulate of these is Myron Lieberman, professor of education, and author of a number of books and many periodical articles on education in general and on the profession in particular.

According to Lieberman,⁸ the rationale for collective bargaining is that although neither side is required to accept a proposal or make specific concessions, it is likely that the parties will agree upon conditions of employment if they are required to bargain in good faith about them. "In other words," says Lieberman, "it is based on the theory that if the parties are forced to adhere to certain procedural requirements, they will ordinarily agree on the issues that are the subject of negotiation."

Lieberman considers the question of whether or not school boards unlawfully delegate any of their discretionary powers by agreeing to bargain collectively.⁹ He notes the American concern with the propriety of the use of collective bargaining procedures by public employees, and points out that while all states recognize the teachers'

⁸Myron Lieberman, The Future of Public Education (Chicago: University of Chicago Press, 1960), p. 161.

⁹Myron Lieberman, Education as a Profession (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1956), p. 346 ff.

rights to form occupational organizations, very few administrators are required to recognize the majority of teachers. So long as school boards are not forced to recognize the teachers' organizations which have signed up a majority of teachers, the teachers have no legal right to bargain collectively.

For his own part, Lieberman does not subscribe to the view that boards surrender discretionary powers by bargaining collectively. He states that "collective bargaining does not force the parties to agree. It is merely the procedure most likely to produce mutually satisfactory agreements when employed in good faith by both parties."¹⁰ He suggests that collective bargaining would be quite consistent with the basic argument for democratic administration, that participation by teachers in policy making adds to rather than detracts from their efficiency and sense of responsibility. Finally, he maintains that the different legal status of the teacher does not call for the elimination of collective bargaining, but may call for the modification of collective bargaining procedures.¹¹

Lieberman's position is buttressed in part by a court decision delivered in 1951.¹² In Norwalk Teachers' Association v. Board of Education, the judge declared that "teachers may engage in collective

¹⁰Ibid., p. 353.

¹¹Ibid.

¹²138 Conn. 269, 83A (2d) 482 (1951). Quoted in L.O. Garber and Newton Edwards, The Law Governing Teaching Personnel (Danville, Illinois: The Interstate Printers and Publishers, 1962).

bargaining provided they do not do so under threat of strike." He further stated that "the claim of the defendant that this [collective bargaining] would be an illegal delegation of authority is without merit. The authority is and remains in the board."

While vigorous debate continues in the United States regarding the efficacy and the ethics of bargaining procedures, the issue appears to be substantially settled in most parts of Canada. Legislative provisions vary and procedures are far from being uniform, but in practice, collective bargaining, whatever the name given it, whatever the procedures used, is the means by which most teachers in Canada negotiate concerning salary and conditions of employment. There seems to have been little concern that the practice of collective bargaining would result in the erosion of school boards' discretionary powers, nor any evidence that this has in fact occurred.

It might further be said that while Canadian teachers have for the most part "cashed in" on the collective bargaining process, they have succeeded to a remarkable degree in avoiding the two major pitfalls feared by American teachers. They have for the most part kept negotiation and settlement procedures either within educational channels or within the influence of educators to a large degree. Secondly, whatever success in bargaining they have achieved has come with little evidence of serious division between teacher and administrator.

Statutory Provisions for Collective Bargaining Procedures

Collective bargaining procedures are employed by teachers in all

provinces but one, whether informally or by statute. Indeed, in Alberta, where teachers bargain collectively under The Alberta Labor Act, the application of this Act does not provide for special procedures for teachers because they are employees of the public. On the other hand, British Columbia and Saskatchewan teachers bargain under special provisions, the former under a clause in the Public Schools Act, the latter under a separate Teachers' Salary Negotiation Act. In Saskatchewan, provincial government employees bargain under The Labor Act, the only civil servants in Canada with that right.

Table I indicates the machinery for collective bargaining and settlement of disputes provided under provincial statutes. It is a summary of data presented in Chapter III.

TABLE I
LEGISLATIVE PROVISION FOR COLLECTIVE BARGAINING

| PROVINCE | COLLECTIVE BARGAINING | CONCILIATION | ARBITRATION |
|----------------------|--------------------------|--------------|-------------|
| British Columbia | Yes | Yes | Yes |
| Alberta | Yes | Yes | No |
| Saskatchewan | Yes | Yes | No |
| Manitoba | Yes | Yes | Yes |
| Ontario | No | No | No |
| Quebec | Yes | No | Yes |
| New Brunswick | No | No | No |
| Nova Scotia | Yes | Yes | No |
| Prince Edward Island | No | No | No |
| Newfoundland | No | No | No |

In only one province, Alberta, is the right to strike stated in legislation.¹³ In only two provinces, Manitoba¹⁴ and Quebec¹⁵ is the right to strike prohibited by legislation. In Ontario, New Brunswick, and Prince Edward Island collective bargaining does take place between teachers and school boards, but not under statute.

In the Province of Quebec a number of pieces of legislation govern bargaining procedures. In general, the provisions of the Labor Relations Act apply to public services and their employees, subject to modifications contained in the Public Services Employees Disputes Act.

Contents of Collective Agreements

Collective agreements are concerned primarily with salaries and conditions of employment. The agreement currently in operation between the Edmonton Local of the Alberta Teachers' Association and The Edmonton Public School Board¹⁶ contains nine major sections, each with a number of clauses. These sections include salary schedule; application of salary schedule; substitute teachers; time for administration and supervision; time for preparatory work relating to school activities; regulations governing payment for absence due to sickness, disability, or accident; regulations governing leave of absence; regulations governing

¹³The Alberta Labour Act, R.S.A. 1955, c.167, s94 (4).

¹⁴The Public Schools Act, R.S.M. 1954, c.215, s.361.

¹⁵The Public Services Employees Disputes Act, R.S.Q. 1941, c.169, s.5.

¹⁶Mimeographed copy Edmonton School District #7 Salary Agreement concluded June 25, 1963, pursuant to The School Act, and The Alberta Labour Act.

sabbatical leave of absence. A recent collective agreement¹⁷ concluded between the United Federation of Teachers of New York and the New York School Board included limitation of class size as a term of the agreement. Again the cry has gone up that this constitutes a further invasion of the discretionary powers of school boards, and again the answer is that the school board had only to bargain, it did not have to capitulate.

A collective agreement now in effect in Montreal¹⁸ contains a total of twenty-seven articles, ranging from most of those outlined in the Edmonton agreement to provisions for maternity leave, promotions, and procedures for settling disputes, grievances and disagreements. This agreement applies to both English and French speaking teachers employed by the Montreal Catholic School Commission.

Limitations

While the right of Canadian teachers to bargain collectively with school boards is for the most part clearly established both by statute and in practice, this does not mean a total absence of limitations upon bargaining procedures. The items bargained for must be within the boards' discretionary power to govern. No collective agreement may violate the statutes. Items covered in the statutes are not negotiable. In the United States, where collective bargaining by teachers is by no means universally accepted, teacher organizations have concentrated upon getting minimum standard conditions of employment,

¹⁷David Seldon, "Class Size and the New York Contract," Phi Delta Kappan, March, 1964, Vol. XLV, No. 6, p. 283 ff.

¹⁸Collective Agreement, September 1, 1962. Published by The Federation of English Speaking Catholic Teachers of Quebec.

salary, job categories, etc., written into the statutes. Such an approach has its critics.¹⁹ Lieberman comments on this:

Indeed, the notion of legislative redress is a fiction and a counsel of futility for teachers, except in connection with setting the basic framework of employment.

It is quite obvious that the more detailed the statutes are in the matter of employment, the narrower the scope for collective bargaining at the local level. Conversely, statutory silence can result in wider local discretion.

The success of collective bargaining procedures employed by Canadian teachers in recent years may be in part attributable to the fact that teachers are powerfully organized. Whereas the individual teacher found himself relatively powerless to bargain with the school board, the bargaining power of a local bargaining unit, supported by the provincial organization's prestige, bargaining technique and experience, and financial resources, has now placed the school board in a less advantageous position. Indeed, the trend is for school boards to band more tightly together and themselves resort to a more sophisticated approach to the question of teacher-board relationships.

III. PROCEDURES

Negotiation

Collective bargaining as practised by teachers' organizations is carried on through bargaining units, as prescribed by the legislation

¹⁹Lieberman, Education as a Profession, p. 350.

or as agreed upon informally. It involves recognition by employing boards of the right of the majority of teachers to bargain through their bargaining agent. The bargaining or negotiating team is elected by the bargaining unit which may comprise the teachers of the local concerned. For the most part, superintendents appointed by the board are excluded from the bargaining unit. In Alberta, the locally appointed superintendents and their chief deputies are excluded. For example, the Edmonton Public School Agreement provides that any supervisory officer whose salary exceeds that of the most highly paid principal be excluded from the agreement.²⁰ While such provisions may vary in detail from province to province, collective bargaining procedures have much in common throughout Canada.

As indicated in Chapter III, bargaining procedures follow a time schedule. Where bargaining is prescribed by law, either party may request the other to bargain, whether to negotiate a new agreement or revise an existing one. If negotiations are unsuccessful, either party may request the appointment of a conciliation board.

Conciliation

The general pattern for setting up conciliation boards is for each party to the dispute to nominate one member, with the third member being named as chairman either by the Minister or a judge. Certain criteria are established which must be met before one is eligible to serve on a conciliation board. Among those listed in

²⁰Edmonton School District #7 Collective Agreement, supra, p.115.

The Alberta Labour Act are:²¹

- a) one must be a Canadian citizen or British subject,
- b) one is ineligible if he has any pecuniary interest in the issue or dispute referred to the board,
- c) one is ineligible if he is the solicitor or counsel of one of the parties or has served as such at any time within the six months immediately preceding the establishment of the board,
- d) one is ineligible if he has received remuneration directly from either party to the dispute within six months prior to the establishment of the board.

A significant case²² tried before the Supreme Court of Alberta is relevant. The Board of Trustees of St. Albert Protestant Separate School District brought an action against the Alberta Teachers' Association, alleging that one McKim Ross should be declared ineligible to serve on a conciliation board appointed to conciliate in a dispute between that board and the St. Albert local of the Alberta Teachers' Association. Counsel for the plaintiff attempted to show that Ross, having served as President of the Alberta Teachers' Association, and having held many other senior offices in the organization, would be biased in favor of the teachers' side of the dispute. Milvain, J., dismissed the case on the grounds that the conciliation board does not perform a judicial or quasi-judicial function. Milvain, J., explained,

²¹R.S.A., 1955, c.167, s.88 (2).

²²Board of Trustees, St. Albert Protestant Separate School District #6 v. Alberta Teachers' Association et al. S.C.Alberta, Trial Division, not yet reported. April, 1964.

As its function is lacking in any judicial attribute, the Court will not interfere--in fact, cannot interfere--in the function of such a body as is the Conciliation Board under the Labour Act.

He went on to point out that had the parties, by mutual agreement, converted the conciliation board into a board of arbitration, the board would then be performing a judicial function. He noted that a conciliation board set up pursuant to The Alberta Labour Act has had its right to act judicially expressly removed from it. Whereas subsection 6 of section 88 originally provided that the Board would "hear and determine" the dispute placed in its hands, in an amendment to the Act in 1957 that "right, power, and duty" was changed to a direction that "it shall make full inquiry and shall endeavour to bring about agreement between the parties." Milvain, J., continued by referring to s.88 (4) of the Act which provides²³

- . . . Before entering upon the exercise of the functions of their office, the members of a conciliation board shall
- a) in writing make oath or affirmation before a Justice of the Peace or other person authorized to administer an oath of affirmation,
 - (1) that they will faithfully and impartially perform the duties of their office . . .

In interpreting the words "faithful" and "impartial" he suggests that in the use of these words the legislation

. . . really means that no undue advantage is to be afforded to either side, and that in following such a dictate, namely, of not giving or affording undue advantage, the Act does contemplate that the person will be governed by intellectual honesty and integrity, notwithstanding the inherent human frailties that do predispose the human mind to one direction or another.

²³R.S.A. 1955, c.167, s.88 (4).

The first of these is the fact that the Government has not yet decided whether it will accept the offer of the United States to purchase the Alaska Pipeline. This is a very important decision, and it is one which the Government must make as soon as possible.

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In reaching his conclusion, the judge referred to two cases²⁴ of a similar nature in which Riley, J., reached the conclusion that the Board under the Act, such as the one considered in the Ross case, does not perform a judicial function, and that certiorari proceedings would not apply to it.

In this judgment, Milvain, J., makes a number of significant points. He distinguishes between the function of conciliation and a judicial function. He confirms the right of a teacher to serve on a conciliation board, subject to the limitations contained in the Act. He also comments on the difference between bias or the giving of undue advantage on the one hand, and intellectual honesty and integrity, despite inherent human predisposition toward one side or another, on the other hand.

Once the conciliation board is constituted, its task is to endeavour to bring the disputing parties into agreement. Where provision is made for arbitration, either with the consent of the disputing parties, or as in British Columbia, Manitoba, and Quebec, where it is compulsory, arbitration as a judicial procedure takes place.

Arbitration

In Manitoba the Act prescribes that a board of arbitration

²⁴Gainers, Ltd. v. Local 319 of United Packinghouse Workers of America (not yet reported) and Re Alberta Labour Act, P.F.Ayriss and Co. et al v. Board of Industrial Relations et al. 30 W.W.R., New Series, at p. 634.

shall be appointed comprising three members and stipulates that the employer's representative not be a trustee of the district or area that is the employer, and that the person nominated by the local teachers' society not be a member of that local society.²⁵

Like conciliation boards and boards of reference, boards of arbitration are armed with considerable power.²⁶ They may summon witnesses, require them to give evidence on oath, administer an oath, "and may receive and accept such evidence on oath, affidavit, or otherwise as in its discretion it may deem fit and proper, whether admissible in evidence in a court of law or not."

Carrothers²⁷ considers the nature of arbitration proceedings. Referring to Re Brooks, Scanlon, and Obrien Co., (1911) 17 W.L.R. 408 (B.C.S.C.) he states:

Arbitration proceedings are quasi-judicial in character and must be conducted in accordance with essential principles for the administration of justice. These principles require that the parties be given a "fair hearing": that they have notice of the proceedings, knowledge of the issues, and an opportunity to be heard, and to hear and meet any evidence adverse to their interest.

He goes on to consider the question of partiality or interest and cites the Saguenay-Kitimat case.²⁸ An extended quotation from Ruttan, J., shows the distinction which the court draws between bias in or

²⁵The Public Schools Act, R.S.M. 1954, c.215, s.392.

²⁶Ibid., s. 413-433.

²⁷Carrothers, op.cit., p. 158.

²⁸Re International Union of Operating Engineers and Saguenay-Kitimat Co. (1956) 6 D.L.R. (2d) 156 (B.C.S.C.)

interest on the part of a conciliator, as indicated by Milvain, J., in the Ross case, and interest or partiality on the part of an arbitrator. Ruttan, J., commented as follows:

On the matter of partiality and misconduct Russell on Arbitration, 15th ed. speaking of the parties to an arbitration says at p. 101: "They are entitled to expect from an arbitrator complete impartiality and indifference, both as between themselves and with regard to the matters left to the arbitrator to decide, and they are entitled to expect from him a faithful, honest, and disinterested decision . . . any personal interest which will tend to bias an arbitrator's mind, which was unknown to either of the parties at the time when the dispute concerned was agreed to be referred, will unfit a person to act as arbitrator" . . . Rand, J., speaking for the whole court in a very recent decision in the Supreme Court of Canada in Szilard v. Szasz ([1955], 1 D.L.R. 370 at p. 373, S.C.R. 3 at pp. 6-7) said:

"It is the probability or the reasoned suspicion of biased appraisal and judgement, unintended though it may be, that defeats the adjudication at its threshold." Such factors as the extent of interest or the behavior of the arbitrator may create a suspicion that may or may not be reasonable. It is not enough merely to be satisfied that it is or may be a just decision but it is of the essence of the transaction that the parties should be satisfied that they come before an impartial tribunal . . . Each case must however be decided on its own facts, and it is not sufficient merely for the unsuccessful party to come forward and say: "Had I known of that interest, I would have objected to him." The reasons for such objection must be examined, and if it appears that the interest revealed, however small, was sufficient to put a reasonable suspicion in the minds of the parties as to the partiality of the arbitrator, then he must be disqualified.

Two Manitoba cases are relevant to the discussion on arbitration and the bias or partiality of arbitrators. Seen in conjunction with the Ross case and the comments of Milvain, J., regarding partiality of conciliators, they emphasize the basic difference between conciliation and arbitration. They also demonstrate that a privative clause, no matter how apparently exclusive, is not necessarily a barrier to judicial supervision.

In one of these cases, the Manitoba Teachers' Society local, bargaining agent for two Duck Mountain teachers, made a motion to set aside an award made by arbitrators appointed by the Minister of Education.²⁹ The motion to set aside was based on alleged bias on the part of one of the arbitrators, Andrew Moore. He had appeared as a solicitor for the school district before a committee set up to investigate a dispute between one of the Duck Mountain teachers, one Peter Bodnaryk, and the school board. When Moore was appointed an arbitrator, the Society refused to participate, on the grounds that Moore could not act impartially. The arbitration board met in any case, and an award was made.

In his judgment setting aside the award, the justice cited at length, previous cases. He quoted Rand, J., in Szilard v. Szasz [1955] S.C.R. 3 at 4:

From its inception, arbitration has been held to be of the nature of judicial interpretation and to entail incidents appropriate to that fact. The arbitrators are to exercise their function, not as advocates of the parties nominating them . . . but with as free, independent, and impartial minds as the circumstances permit.

And further, from Sims v. Seller [1927] 2 D.L.R. 251:

A person who has been actively interested in previous litigation between the parties should not be appointed as an arbitrator; but where there is no provision against such appointment in the agreement to submit, and the opposite party has not made any active protest against his appointment an award of arbitrators of which such person is one will not be set aside.

Commenting on the authority of the court to interpret the legis-

²⁹Intermountain Division Association No. 36 v. Duck Mountain S.D. (1961) 38 W.W.R. 106.

lation, the judge referred to The Public Schools Act, s. 387 (11) which reads:

When the minister has given notice to parties that a board of arbitration has been appointed under this Part it shall be conclusively presumed that the board of arbitration described in the notice has been established in accordance with this Part; and no order shall be made, or process entered, or proceedings taken, in any court to question the appointment of the board of arbitration or to review, prohibit, or restrain, the establishment of that board of arbitration or any of its proceedings. En. S.M. 1956, c. 53 Am.

He pointed out that

. . . this subsection deals with the appointment of a board of arbitration and with the proceedings of such a board, but says nothing as to the principles upon which the arbitration should be conducted. It can therefore be assumed that an arbitration under The Public Schools Act is an arbitration such as is described in Szilard v. Szasz, that is, an adjudication by an impartial tribunal, and therefore the principles by which the validation of such an arbitration should be tested are those emphasized in the judgments which he quotes: In my opinion the proper tribunal to apply such a test is a court of law. I therefore hold that subs. (11) refers only to matters of form and procedure and not to matters of substance which affect the validity of the arbitration and these are open for my consideration.

The court held that Moore was disqualified and so set aside the award.

The second Manitoba case is also worthy of examination in some detail. In Manitoba Teachers' Society v. School Division of St. James No. 7,³⁰ the Manitoba Teachers' Society sought to have an arbitration award set aside. In this instance a board of arbitration set up to adjudicate a dispute between the parties, held a meeting to receive evidence from the chairman of the Municipal and Public Utility Board,

³⁰(1958) 65 Man. R. 317.

without notifying either of the parties to the dispute. Neither party was present but evidence was heard. The Society's counsel cited Halsbury on grounds for setting aside an arbitration award.³¹ Among grounds for setting aside such an award, Halsbury includes the following:

1) that the award has been improperly procured as, for instance, where the arbitrator has been deceived or material evidence fraudulently concealed;

2) that the arbitrator has misconducted himself or the proceedings;

Misconduct occurs, inter alia,

. . . if there has been irregularity in the proceedings as, for example, when the arbitrator failed to give notice to the parties of the time and place of meeting, . . . or taking evidence in the absence of both parties.

The motion to set aside was made on the above grounds of misconduct and was affirmed by the court.

Other Administrative Boards

In the provinces where collective bargaining procedures are statutory, additional administrative boards function as adjuncts to the bargaining machinery.

In Manitoba the Collective Agreement Board³² rules on matters relating to collective agreements, e.g. (a) as to whether a group of teachers constitutes an approved bargaining unit, or (b) as to whether a collective agreement is in fact in full force.

³¹Rt. Hon. Lord Simonds (ed.), Halsbury's Laws of England, 3rd ed., Vol. 2 (London: Butterworth & Co. (Publishers) Ltd., 1954), pp. 57, 58.

³²The Public Schools Act, R.S.M. 1954, s. 413-433.

Alberta's Contract Observance Board³³ rules on differences as to interpretation, application, operation, or any alleged violation of a collective agreement.

Both of these boards function in a quasi-judicial manner and their operation is pursuant to the provision in legislation that disagreement on questions of collective agreement is subject to arbitration.

Non-Statutory Bargaining

A survey of collective bargaining procedures and results from those procedures in provinces where there is no legislation on the matter, reveals interesting contrasts.

Ontario has no collective bargaining legislation and yet effective collective bargaining occurs throughout the province. Teachers have found a number of means³⁴ to strengthen their bargaining hand. One of these is the "grey" or "pink" letter. In the event negotiations over salary or working conditions break down, the membership of the affiliate (of O.T.F.) concerned is sent a "grey" or "pink" letter informing them that a dispute exists between the school board involved and the affiliate, and that relations between the two groups will remain unsatisfactory until a mutually acceptable agreement has been reached. Teachers are advised to contact their organization office before applying for or accepting a position with

³³The Alberta Labour Act, R.S.A. 1955, c.167, s.73 (6).

³⁴Interview with S.G.B. Robinson, General Secretary, O.S.S.T.F.

the board with which relations are considered to be unsatisfactory.

Another device intended to render informal collective bargaining effective is employed by the Ontario Secondary School Teachers' Federation, an affiliate of the Ontario Teachers' Federation. This is a rating procedure, whereby teachers rate the boards by which they are employed under the following headings: (1) attitude of the board toward educational improvement; (2) relations between board and staff; (3) conditions of work.

Boards are rated on each of these items on a continuum ranging from excellent to poor, with scores assigned accordingly. A comprehensive listing of these rating scores is made and distributed to all members in good standing of the affiliate. It is intended to be of assistance to a teacher who contemplates a change of position and also as a guide to boards in the matter of teacher-board relationships.

As indicated earlier, New Brunswick has a unique approach toward the settlement of bargaining disputes.³⁵ While there is no collective bargaining machinery established by legislation, either party to a dispute may apply to the Minister for the appointment of a Mediation Board, comprising five members, one each from the local school board and local teacher group, one each from the New Brunswick Teachers' Association and the New Brunswick School Trustees' Association, and a fifth named chairman by the Minister. The findings of such a board are not binding on either party.

In Prince Edward Island there is no legislative provision for

³⁵N.B.T.A. Handbook, 1961, p.39.

collective bargaining, but collective bargaining does take place between teachers and school boards in the larger centers.³⁶

In Newfoundland, a provincial salary scale is in operation. There is no legislative provision for collective bargaining between the Newfoundland Teachers' Association and representatives of the government, and interaction between government and teachers regarding salaries could scarcely be classified as collective bargaining. Moreover, conditions of employment rarely constitute a topic for discussion or negotiations between the parties. This is not to say, however, that the Newfoundland Teachers' Association is without influence in the matter of salary and working conditions for its membership. Representatives of the Newfoundland Teachers' Association do meet regularly with representatives of the government of Newfoundland and press vigorously for the economic welfare of the membership.³⁷

Further Litigation

While litigation concerning teacher-board collective bargaining disputes has not been common in Canada in recent years, there have been a few cases which appear to be relevant. The Ross case has already been cited and concerns the right of a teacher to serve on a conciliation board. Also the Manitoba cases cited are relevant to the question of bias or misconduct of arbitrators.

³⁶Letter from Miss Anna Riley, General Secretary, P.E.I.T.F.

³⁷Interview with N. Ray Wight, General Secretary, N.T.A.

A Quebec case³⁸ concerned a contract between an association of teachers and a school board arrived at by collective agreement providing for an annual salary of \$900 per annum. Plaintiff was engaged for the school year 1945-46 at that salary. By a letter written in May of 1946 the defendant board terminated the collective agreement as of June 30. The board attempted to re-engage the plaintiff for the following year at the rate of \$600 per annum. She refused and sued for salary at the rate of \$900. It was held that the plaintiff was entitled to judgment. Her contract, which was wholly distinct from the collective agreement, had been automatically renewed under the Act, because the defendants had never terminated it in accordance with the Act.

Sec. 232, R.S.Q. 1941, c. 59.

School boards after having decided by resolution at a regular meeting not to re-engage for the following year a teacher already in their service shall before the 1st of June preceding the expiration of the engagement of such teacher, notify him in writing of their intention to terminate the said agreement.

Sec. 233.

Any teacher who has not received the notification mentioned in 232 shall be deemed to be re-engaged for the following year for the same school and upon the same terms unless one of the cases specified in para. 2, s.221 [re summary dismissal] may be invoked against him.

In handing down his judgment, the judge stated:

The collective agreement had for its object the protection of teachers in the service of the defendants and not the limitation of the rights which the law confers upon them.

The collective agreement had no effect upon the plaintiff's contract,

³⁸Loragé v. Commissionnaires des Ecoles de Verchères [1948]
Que. S.C. 410.

nor did it exclude the operation of the Act.

In British Columbia³⁹ the Supreme Court found that a school board had to accept collective arbitration instead of individual arbitration as it had requested.

A further British Columbia case⁴⁰ appears to have significant implications for collective bargaining proceedings. Upon failure of negotiations between Kelowna teachers and the Kelowna district school board, recourse to arbitration resulted in an award which granted a teachers' request for an additional bonus covering the payment of fees up to \$30 per course to be paid to teachers who attended a summer school course, to be approved by the Superintendent. The school board brought forward a motion for the setting aside of this portion of the award of the salary arbitration. The court accepted the motion, holding that it was not the intention of the Legislature to confer upon a salary Arbitration Board power to impose upon a school district a financial burden which has no relation to salaries. The clause relating to the special bonus on fees for summer school was ordered set aside. This judgment appears to be significant on two counts. On the one hand it sets aside an award made by a quasi-judicial body despite provision in the statute that the award be final and binding on both parties (c.319

³⁹Re Kelowna School District Trustees and Kelowna Teachers' Association [1956] 17 W.W.R. 650.

⁴⁰School Trustees of S.D.#23 (Kelowna) v. The Kelowna District Branch of the Okanagan Valley Teachers' Association. July (1963) B.C.S.C. (Not yet reported.)

S.B.C. 1958 s.140 (2).) Secondly, it throws open to question interpretation of the word "salaries" and indeed opens up the whole question of what items may be included in a collective agreement. Whereas in other provinces salaries and conditions of employment are negotiable, in British Columbia the Public Schools Act provides that teachers may negotiate with boards "for salaries or salary schedules" only.⁴¹

Individual Rights

Since collective bargaining is by nature a group process, the question of individual rights is not often brought to the fore. The individual teacher has a vote in selecting the negotiating team for his bargaining unit. He also may vote as provided when the various stages of negotiation and conciliation take place. He has the right to present a grievance if he feels his contract is not being observed. As indicated by the Lorange case, there are times when the individual contract takes precedence over a collective agreement. Carrothers suggests also that the collective agreement protects the individual employee against the vagaries of the common law. Whereas by common law, the employer has the right to discharge without cause, this may be prohibited by a seniority clause in the collective agreement. It may also, of course, be prohibited by legislation. Likewise promotion, transfer, and lay-off clauses may afford the individual a measure of protection he might not otherwise enjoy. Finally, as already indicated,

⁴¹1958, c.42, s.137 (B.C.)

the Ross case establishes the right of the individual teacher to serve on conciliation boards.

IV. SUMMARY

Collective bargaining procedures are carried on by teachers across Canada, whether under legislation or informally. Collective bargaining by school boards is not generally considered, in Canada, to constitute a surrender of discretionary powers conferred by statute. The right to strike is expressly forbidden in Manitoba and Quebec, while in Alberta this right is expressly confirmed in The Labour Act. Wherever collective bargaining officially obtains, questions of interpretation and application of the agreement are open to compulsory arbitration, and disputes concerning them must not occasion work stoppage. Conciliation proceedings are not subject to court interference. Arbitration, being a quasi-judicial procedure, is subject to judicial review.

Informal collective bargaining, supported by such measures as the pink letter or board rating practices, is common in Canada. Mediation procedures, not generally spelled out in legislation, are applied with powerful effect.

While machinery is provided by statute for the settlement of disputes, the courts are not without influence in this area.

In their capacity as supervising authority over the quasi-judicial process, they rule on matters of law, and on occasion have set aside findings of arbitration boards on grounds that jurisdiction

has been exceeded, bias shown, etc. In a British Columbia case the court ruled on the question of what items constitute proper subjects for bargaining between teachers and boards.

Courts have also ruled on the eligibility of teachers to sit on conciliation boards.

Finally, while collective bargaining is essentially a group process, rights of individuals are by no means lost sight of, either their right to participate in the proceedings or to obtain redress in the case of grievance.

Writing in a recent edition of the Yearbook of School Law,⁴²

Reynolds Seitz suggests

. . . that good faith bargaining is one of the best methods of keeping the school personnel realistically informed about vital problems concerning the operation and administration of schools . . . and that good faith collective bargaining can be the creating of a climate which will enlighten the general public to problems of the schools and enlist assistance for their solution.

⁴²Reynolds Seitz, "Rights of School Teachers to Engage in Collective Bargaining and Other Concerted Activities," Yearbook of School Law, 1963, p. 222.

CHAPTER VI

THE LEGAL STATUS OF THE TEACHER REGARDING TENURE AND TERMINATION OF CONTRACT

I. INTRODUCTION

The legal status of a Canadian teacher changes as he comes under the provisions of tenure legislation. Brief reference was made to tenure and tenure legislation in Canada in Chapter III. In the present chapter an attempt is made to define tenure and related terms, to distinguish between the legal status of a tenure teacher and that of a non-tenure teacher, and to state the purpose and rationale underlying tenure legislation. Criteria for judging tenure legislation are submitted as a basis for comparison of legislation in existence in the provinces of Canada and this legislation is analysed, comparison drawn, and contrasts noted. The machinery provided for in legislation to deal with questions of suspension and dismissal of teachers is examined, and the functioning and efficacy of such machinery considered. In particular, the role of quasi-judicial bodies dealing with tenure disputes is assessed. The informal procedures employed by teacher organizations in coping with teacher-board disputes regarding suspension and dismissal of teachers will come under examination. Where appeal has been made to the courts, pertinent cases are cited. American cases in particular are cited, inasmuch as tenure cases in Canada rarely reach the courts. Due note is taken of the apparent conflict between

the common law of contracts and the provisions of tenure legislation. Finally, the question of termination of designation is raised and the procedures for accomplishing it considered.

II. TENURE LEGISLATION

Definition of terms

In Chapter III, tenure was defined as "a set of rights conveyed and protected by law whereby a teacher cannot be dismissed from his position except under provisions laid down by statute."¹

The National Education Association defines a tenure law as²

. . . one which (a) provides for continuing employment of teachers, who, under its terms have acquired permanent tenure or continuing contract status; and (b) requires boards to comply with prescribed procedural provisions of notice, statement of charges, and right to a hearing, before a tenure teacher can be dismissed, or before nonrenewal of contract of employment can be effective.

A distinction should be drawn between a tenure law and a continuing contract law. Whereas the former requires notice, statement of charges, and a hearing, before dismissal can properly take place, the latter may provide only that the teacher be given advance notice of non-renewal of his employment contract, usually without reasons having to be given. Edwards states that laws providing for permanent tenure are to be interpreted as "intending only a regulation of dismissal for causes personal to the employee." It is not unusual, however, for

¹Supra, p. 51.

²"Teacher Tenure Laws" N.E.A. Research Bulletin, Vol.38, 1960, p.81.

tenure legislation to include provision for continuing contract.³

The term "probationer" is used from time to time, and for the purposes of this chapter is taken to mean a teacher who has not acquired tenure status, i.e., has not served under a particular board long enough to meet the probationary requirements specified in the legislation.

Purpose of tenure legislation

The rationale underlying tenure legislation is that it affords teachers a measure of job security and the assurance that they will not be dismissed, suspended, or transferred arbitrarily or capriciously.

Garber⁴ suggests that the purpose of tenure is

. . . to protect competent and qualified teachers in the security of their positions during good behavior, and to protect them, after they have undergone a probationary period, against removal for unfounded, flimsy, or political reasons.

He goes on to say that tenure legislation contributes to

. . . the maintenance of an adequate and competent teaching staff, free from political and personal arbitrary interference.

And again he states that⁵

. . . tenure is a right acquired pursuant to law. Consequently this right of a teacher to tenure can only be breached following the statutory method prescribed for so doing.

Conversely, it may be inferred that tenure legislation provides school boards with a legally established procedure for dismissing

³Newton Edwards, The Courts and the Public Schools, (Chicago: University of Chicago Press, Revised 1955), p.467.

⁴Lee O. Garber, The Yearbook of School Law, 1964.

⁵Garber, The Yearbook of School Law, 1956, p. 59.

teachers "for good and just cause." Again Garber's comment is pertinent. He says⁶

The enactment of tenure law does not prohibit school boards from dismissing inefficient teachers. Such a law specifies the reasons for dismissal and the method of making dismissal effective.

A National Education Association research report⁷ deals with the purpose of tenure legislation in the following terms:

The basic purpose of tenure legislation is to protect teachers who have successfully completed their probationary period, from unjust dismissal for unfounded personal, political or religious reasons, during competent performance of their duties and during good behavior. At the same time, these laws provide for orderly dismissal from the school system, of teachers who are clearly incompetent professionally, or whose conduct is proven to be inimical to the best interests of the schools and the pupils they serve.

Finally, it may be hypothesized that sound tenure legislation, by protecting competent teachers from unjust or capricious dismissal, and by providing school boards with machinery whereby the incompetent or the unfit may be dismissed, contributes to better education in the jurisdiction where it applies.

Criteria of tenure legislation

Tenure legislation for teachers, in order to be effective, should include certain basic provisions. In order that a basis for comparison may be provided in examining Canadian legislation, a resumé of characteristic or salient provisions included in tenure legislation

⁶Garber, The Yearbook of School Law 1958, p. 109.

⁷N.E.A. Research Bulletin, op.cit., p. 81.

in the United States is submitted here, not necessarily as a model of what such legislation should always be, but as an example of what teachers and legislators in another country have developed. This resume of prevailing tenure legislation in the United States is contained in a research study done by the National Education Association. The study indicates that in the main, tenure legislation in the United States is characterized by the following provisions:⁸

- (1) General provisions:
 - a) who is to be covered by the legislation;
 - b) what is to be the extent of the probationary period, if any;
 - c) causes for dismissal;
- (2) Procedural rights:
 - a) notice;
 - b) statement of charges;
 - c) hearing;
 - (i) procedure for conduct of a hearing.

Referring to the general provisions, most tenure legislation covers teachers, principals and other supervisory personnel. Superintendents are sometimes specifically included, at other times excluded.

In most instances, the probationary period is three years.

Provisions concerned with causes for dismissal tend to be one of three types:

- 1) they enumerate specific causes;
- 2) they enumerate specific causes, with the added phrase "and other good and just cause";
- 3) they do not enumerate but merely say "for good and just cause."

⁸Ibid., pp. 82, 83.

It need scarcely be pointed out that the discretionary power of the school board in matters of dismissal increases, moving from type one through type three.

Where enumerated, causes tend to fall into two general categories, one of which is personal to the teacher, the other of an external nature. The former usually includes immorality, incompetency, insubordination, and neglect of duty; the latter such contingencies as reduced pupil enrollment, abolition of position, or reduction of teaching staff due to economies.

Procedural provisions regarding the conduct of a hearing received special consideration from the National Education Association Committee on Tenure and Academic Freedom. This committee recommended a minimum of nine essentials to a proper and fair school board hearing of a tenure question, to be included in tenure legislation. These essentials are:⁹

- a) adequate notice and statement of charges
- b) presence of counsel
- c) testimony of witnesses under oath or affirmation
- d) right to subpoena witnesses
- e) restriction of evidence to charges
- f) right to argument on evidence and law
- g) stenographic transcripts of evidence and argument
- h) consideration of evidence and argument by the entire school board, and
- i) vote of at least a majority of the entire school board.

A major distinction between Canadian and American practice lies in the fact that while in Canada school boards generally are required to give notice and reasons for dismissal, they do not conduct formal

⁹Ibid., p. 84.

hearings. This is done either by an investigation committee as a first stage or by a board of reference or board of conciliation. American school boards may conduct a hearing in the fashion of a quasi-judicial body, with appeal being permitted to state boards of education or to the courts. In Canada, findings of a board of reference are either binding or subject to appeal to the minister, or other authority. Rarely does a tenure case come before a court in most Canadian provinces. When cases do come before the courts, the judgment is concerned with the procedures employed by the investigating authority and not with the substance of the findings. If awards are set aside it is because of some procedural aberration or misconduct of board of reference members, or misconduct of the hearing itself.

Legislative Provisions

Examination of the machinery established by legislation to deal with tenure questions in Canada reveals that in many cases it may be used to deal with cases of suspension or dismissal of teachers whether they be classified as tenure teachers or non-tenure teachers, and whether the suspension or dismissal be summary, on notice during the school year, or on notice at the end of the school year.

Eight provinces have tenure legislation for teachers.¹⁰ Table II

¹⁰Legislative References:

B.C.: Public Schools Act, 1960, c.319. (B.C.);
 Alberta: The School Act, R.S.A. 1955, c.297;
 Saskatchewan: Teacher Tenure Act, R.S.S. 1953, c.185;
 Manitoba: The Public Schools Act, R.S.M. 1954, c.215;
 Ontario: The Schools Administration Act, 1954, c.86, (Ont.);

sets out some of the provisions of that legislation.

TABLE II
TENURE LEGISLATION IN CANADA

| Province | Probationary Period | Machinery | Binding Authority |
|------------------|--|-----------------------|--|
| British Columbia | 1 year | Board of Reference | Recommends to Council of Public Instruction |
| Alberta | 1 year | Board of Reference | Binding and final on both parties |
| Saskatchewan | 2 years | Board of Conciliation | May recommend only, except where parties agree to be bound |
| Manitoba | 2 years | Board of Arbitration | Recommendations subject to appeal under provisions of <u>Arbitration Act</u> |
| Ontario | 1 year for experienced teachers; 2 years for inexperienced teachers | Board of Reference | Binding on both parties |
| Quebec | 2 years, 8 months | Board of Arbitration | Binding on both parties |
| New Brunswick | 3 years | Board of Reference | Binding on both parties |
| Newfoundland | none | Board of Arbitration | Binding on both parties |

In the case of both Ontario and New Brunswick, the Minister may accept

Quebec: Education Act, R.S.Q. 1941, c.59;

New Brunswick: School Trustees' and Teachers' Board of Reference Act; 1956, c.12 (N.B.);

Newfoundland: The Education Act, 1960, c.50 (Nfld.)

or reject the application of a tenure teacher or of a school board for a hearing before a board of reference. In Alberta,¹¹ no application for a board of reference shall be made

- a) where the contract has been terminated with the approval, in writing, of the minister,
- b) where the contract has been in effect for less than twelve months, or
- c) where the teacher has been summarily dismissed pursuant to section 350 of The School Act.

A sharp distinction between the rights of a probationer and a tenure teacher is illustrated in an A.T.A. publication.¹² Referring to the Alberta scene, the following statement appears:

At the end of the first year of employment with a school board, a teacher is subject to dismissal at the sole discretion of the school board. There is no appeal. This regulation applies to all appointments, regardless of academic and professional qualifications and experience. Every time a teacher accepts an offer of employment from a school board he is on probation for one year and is subject to dismissal without cause.

The manner in which members are appointed to boards of reference varies. Generally there are three such members, one appointed or nominated by each of the disputing parties or their respective organizations, and one by the Minister. The latter is usually chairman, and in several instances it is specified that he be a judge.

Exceptions to this pattern occur in Alberta where only one person is appointed, a judge, by the Lieutenant-Governor-in-Council,

¹¹The School Act, R.S.A. 1955, c.297, s.352 (2).

¹²A.T.A. Supplementary Brief to the Royal Commission on Education, (Published by the Alberta Teachers' Association, Edmonton, 1958), p. 29.

without reference to the disputing parties.

In most instances failure to nominate by the disputing parties as prescribed results in nomination by the Minister or a judge. In Saskatchewan, if such failure occurs, the remaining members or member exercise power.

In Newfoundland, the Superintendent of the denominational system in which the dispute arises is automatically a member of a board of reference or arbitration. The others are appointed, one by the Newfoundland Teachers' Association, and the third by the two already appointed. If they fail to do so, the Minister will appoint a chairman.

As already indicated, there are several methods by which school boards may dismiss teachers. Most of these are now governed by tenure legislation in the eight provinces listed in Table II. A general exception is that of summary dismissal for gross misconduct, immorality, or neglect or refusal to obey a lawful order of a school board. In no instance can a case of summary dismissal be brought before a board of reference. The general pattern is for provision to be made for appeal to the minister or the chief superintendent, who has discretion in confirming or reversing the action of a school board in summary dismissal cases.

A distinction must be made between the continuing contract type of tenure legislation such as applies to teachers who have served their probationary period and have acquired continuing contract status, and the legislation which offers protection against arbitrary dismissal

during the school year. Saskatchewan legislation emphasizes this distinction. The School Act¹³ provides for board of reference machinery to deal with termination of contract at a time other than June 30th. The Teacher Tenure Act¹⁴ provides for a conciliation board to hear disputes concerning non-renewal of contract. It should be noted that while the board of reference has the power to make decisions that are binding on both parties, the conciliation board, as the name implies, can only recommend. Thus it can be seen that the provision against arbitrary dismissal carries greater authority than does the provision governing non-renewal of contract.

Table III depicts causes for dismissal, notice required, if any, and effective date of termination of contract.¹⁵

As Table III indicates, practice regarding the dismissal of teachers, while having features in common, is by no means uniform across Canada. It will be noted that whereas causes for summary

¹³R.S.S. 1953, Amended to 1959, c.169, s.221.

¹⁴R.S.S. 1953, c.185, s.6.

¹⁵Legislative References:

Public Schools Act, 1960, s.129 (B.C.);
The School Act, R.S.A. 1955, c.297, s.350;
The School Act, R.S.S. 1953, c.169, s.114 and s.220;
The Public Schools Act, R.S.M. 1954, c.263, s.263;
The Department of Education Act, 1954, c.20, s.11 (Ont.);
The Education Act, R.S.Q. 1941, c.59, s.221;
The Schools Act, R.S.N.B. 1952, c.204, s.63;
The Education Act, R.S.N.S. 1954, c.78, s.100;
The Education Act, 1960, c.50, s.43 (Nfld.)
The School Act, R.S.P.E.I., 1951, c.145, s.52.

TABLE III

LEGISLATIVE PROVISION FOR DISMISSAL AND TERMINATION OF CONTRACT

| <u>Province</u> | | <u>Notice</u> | <u>Date Effective</u> |
|----------------------|---|-----------------------------------|--|
| British Columbia | Gross misconduct | Summary | |
| | Misconduct and inefficiency | 30 days | Dec.31, June 30 |
| Alberta | Gross misconduct, neglect of duty, insubordination, mental infirmity | Summary (with appeal to Minister) | |
| | Anything in the mode of life, character and disposition of teacher inimical to proper and efficient conduct of school | 30 days | Any time during school year (With approval of Minister) Prior to May 31st if effective in July |
| Saskatchewan | Gross misconduct, neglect or refusal to obey a lawful order of the board | Summary | |
| | For cause | 30 days | Any time |
| | Without stipulating cause during first 2 years of employment | May 25 | June 30 |
| Manitoba | Wilful neglect or refusal to carry out agreement | Summary suspension of certificate | |
| | Emergency affecting welfare of community or teacher | 30 days or one month's salary | |
| Ontario | Conduct in the opinion of the Minister adversely affecting the welfare of the school | 30 days or one month's salary | |
| Quebec | Incapacity, negligence, insubordination, misconduct or immorality | Any time | |
| | Without stipulating cause | 30 days | June 30 |
| New Brunswick | Gross neglect or immorality | Summary | |
| | For cause | 2 months | June 30 |
| Nova Scotia | Incompetency, persistent neglect of duty, immoral conduct | Summary | |
| Newfoundland | Drunkenness, immoral conduct, conviction for a criminal offense | Summary | |
| Prince Edward Island | Gross neglect of duty, misconduct, or immorality | Summary | |

dismissal are generally enumerated, causes for dismissal on notice are enumerated in some provinces while not enumerated in others. This is in keeping with the criteria for tenure legislation in the United States. In some instances of summary dismissal, a month's salary is given in lieu of notice. In the case of Manitoba, while the legislation does not spell out a provision for summary dismissal per se, it does provide for summary suspension of the teacher's certificate. This in effect places the power of summary removal of a teacher from the classroom in the hands of the certificating authority, rather than in the hands of the school board. Some implications of this type of provision will be examined later in an examination of Raymond v. School Trustees of the Village of Cardinal, 14, O.A.R. 562.

Table IV depicts the provisions for the procedure to be followed by quasi-judicial bodies investigating disputes concerning termination of contract.¹⁶ The categories used are selected from those recommended by the National Education Association Committee on Tenure and Academic Freedom. Only those categories which have application in Canada are used.

¹⁶Legislative References:

Public Schools Act, 1960, s.134 (B.C.);
The School Act, R.S.A. 1955, c.297, s.351-357;
The Public Inquiries Act, R.S.A. 1955, c.258;
The School Act, R.S.S. 1953, c.169, s.221;
The Education Department Act, R.S.M. 1954, c.56, s.27;
The Arbitration Act, R.S.M. 1954, c.7;
The Schools Administration Act, 1954, c.86, s.25-30 (Ont.);
The Public Inquiries Act, R.S.O. 1960, c.323;
The Quebec Trades Disputes Act, 1949, c.26, s.27-30 (Que.);
The School Trustees' and Teachers' Board of Reference Act, 1956, c.12 (N.B.);
The Inquiries Act, R.S.N.B. 1952, c.112;
The Education Act, 1960, c.50, s.43 (Nfld.);
The Public Inquiries Act, R.S.N. 1952, c.24.

TABLE IV

BOARD OF REFERENCE PROCEDURES

| Province | Statement of Charges | Powers | Restriction of Evidence to Charges | Representation by Counsel | Fee Deposit |
|------------------|----------------------|--|--|------------------------------|--|
| British Columbia | Yes | Subpoena witnesses. Administer oath. Require evidence under oath. Require the production of documents. | Yes | Yes | \$50 |
| Alberta | Yes | As prescribed by <u>Public Inquiries Act.</u> | Silent | Yes | \$50 |
| Saskatchewan | Yes | Subpoena witnesses. Administer oath. Take evidence under oath. | Yes, unless Board determines otherwise | Yes | \$15 |
| Manitoba | Yes | As prescribed by <u>Arbitration Act.</u> | Silent | Yes | None |
| Ontario | Yes | As prescribed by <u>The Public Inquiries Act.</u> | No legislative provision but restricted by judge | Yes | Minister may require applicant to furnish security for costs |
| Quebec | Yes | As provided by the <u>Quebec Trade Disputes Act.</u> | Silent | Right to unpaid counsel only | None |
| New Brunswick | Yes | As prescribed by <u>Inquiries Act.</u> | Yes | Yes | May require \$300 security for costs |
| Newfoundland | Yes | As prescribed by <u>Public Inquiries Act.</u> | Silent | Yes | None |

It is apparent from Table IV that procedures governing the conduct of quasi-judicial hearings concerning tenure disputes are similar in substance across Canada. The powers are in general those conferred upon a commissioner by the various public inquiries acts. While counsel is generally permitted, it is of interest to note that in Quebec, only unpaid counsel may appear. A substantial variation in financial deposit is evident, ranging from no fee in several provinces to a possible \$300 in New Brunswick. Ontario legislation provides for severe penalties in the event of non-compliance with the award of a board of reference. The act reads:¹⁷

29(1) The direction of the Board of Reference under section 28 shall be binding upon the board and the teacher.

(2) If a board fails to comply with the direction of the Board of Reference under section 28, any amounts then or thereafter payable to the board under any Act of the Legislature shall not be paid to the board until it has complied with the direction.

(3) If a teacher fails to comply with the direction of the Board of Reference under section 28, the Minister shall suspend the certificate of qualification of the teacher for such period as he may deem advisable.

No such punitive clause appears in the tenure legislation of other provinces. It is assumed, however, that failure of a board or teacher to comply with findings of a Board of Reference would constitute grounds for a court action. This assumption is based upon the fact that the statutes provide that findings shall be binding on both parties.

In general, Table IV reveals that procedural provisions in tenure legislation in Canada measure up reasonably well to the

¹⁷The Schools Administration Act 1954, c.86, s.29 (1) (2) (3)
(Ont.)

criteria presented at the beginning of the chapter. At the same time, the machinery provided is such as to be termed quasi-judicial in function.

Termination of designation

Before turning from the discussion of tenure legislation, a word should be said about the practice of designation and termination of designation. The position of principal or vice-principal of a school is classified as a designated position in the school acts of British Columbia and Alberta. Each of these two acts contains provision for the termination of designation. In British Columbia,¹⁸ designation may be terminated on the grounds of incompetence or inefficiency, at the end of a school year. One whose position has been so terminated may appeal to the Superintendent of Education for a review of his case. The Superintendent has the power to confirm or reverse the action of the school board. Termination of designation is not subject to appeal to the board of reference. Notification of termination shall be in writing, stating the date upon which it takes effect.

In Alberta,¹⁹ the provisions governing termination of designation are spelled out in more detail. They also provide for more substantial recourse. Termination for cause may occur during the year, with the consent of the Minister, and on 30 days' notice. It may occur at the end of the school year with notice by June 1st. The following provisions constitute the recourse open to one whose designation has been terminated:

¹⁸Public Schools Act, 1958, c.42, s.129 (B.C.)

¹⁹The School Act, R.S.A. 1955, c.297, s.372.

(1) If a teacher receives a notice of termination of designation effective in the month of July he may, within seven days of the receipt of the notice, request in writing a hearing before the board.

(2) If a hearing is requested, the board, within fourteen days of the receipt of the request, shall provide an opportunity for the teacher to appear before the board or a committee thereof to hear the reasons for the withdrawal of the designation and to reply thereto.

(3) If the board does not withdraw the notice of termination within seven days from the date of the hearing, the teacher may within fourteen days from the date of the hearing, appeal to the Minister who shall cause an investigation to be made and who may, in his discretion, confirm or disallow the termination of the designation.

A further clause states that while termination of the teacher's contract also terminates his designation, termination of his designation under s.371 does not terminate the contract of the teacher. The procedures employed in a ministerial investigation of a termination of dispute are of interest. It will be recalled that in the opening chapter of this study reference was made to the distinction between a British and an American view of the quasi-judicial function. The British regard the quasi-judicial function as an administrative one, to which one or more judicial elements are added.²⁰ They regard the quasi-judicial procedure as "a controlled fact-finding procedure, followed by an uncontrolled decision on policy." The American view, on the other hand, is that a quasi-judicial tribunal constitutes "a merger of the functions of the prosecutor and judge."²¹ The procedures employed in a ministerial investigation of a termination of designation case in Alberta parallel closely those visualized by the British conception of quasi-judicial function. The Minister, on appeal to him, causes an investigation to

²⁰Supra, p. 22.

²¹Supra, p. 24.

be made by a third party. Such a hearing²² has some of the trappings of a quasi-judicial hearing in that due notice is given, a statement of charges made, and evidence to support the charge made. Both parties may be represented by counsel, who may cross-examine witnesses. The report which the investigator makes is presented to the minister and is available to both parties. It is not a privileged or confidential document. In the final analysis, however, the hearing is not a quasi-judicial one in the American sense in that the procedures followed are not provided for in the Act, there is no authority to subpoena witnesses, nor to compel witnesses to give evidence. Moreover, the Minister's decision is an independent one. Unlike the board of reference, the ministerial investigation is not clothed with power to decide. Upon receipt of the report and recommendations, if any, from such investigation, the Minister makes an independent decision. Wade's comment²³ bears repeating at this point.

The general rule as to the quasi-judicial procedure is that it must satisfy the requirements of 'natural justice'. The whole theory of 'natural justice' is that ministers, though free to decide as they like, will in practice decide properly and responsibly, once the facts are laid before them.

An Ontario case, *Houle v. Board of Trustees*,²⁴ is relevant to

²²Terms of Reference for Investigators Under Section 272 (3) of The School Act, R.S.A. 1955, c.297. Note: These terms of reference are informal and were obtained from the Chief Superintendent of Schools for Alberta.

²³Supra, p. 23, 24.

²⁴Houle v. Board of Trustees of the Roman Catholic Separate School for the Town of Mattawa, et al. Unreported case, October, 1961.

the question of termination of designation. Houle, a principal, was dismissed from his position, and initiated an action. At issue in the action was the question of whether the plaintiff, in receiving notice of his dismissal as principal, was also discharged as a teacher. The judge so found, saying that "the principal is the head teacher and therefore, his employment and discharge would include his teaching services." He also held that a principal would have a right to a reference under the Act. The Ontario Teachers' Federation was interested in the case, and considered appealing the decision, but decided against so doing on the advice of their legal counsel. This advice included the following statement:²⁵

From the point of view of your Association, the judgement should serve a useful purpose, and if we were successful on the appeal, we would have had to get the Court of Appeal to hold that the principal's discharge did not include his discharge as a teacher, and, therefore, if you made a complete separation of these two offices, it would have followed that the principal would not have had a right to a reference.

In deciding as it did on this issue, the Ontario Teachers' Federation chose to rely upon its board of reference legislation as the means of protecting the tenure of all teachers in the province, whether occupying designated positions or not. In an earlier case, Re Clarke and The Board of Education of Toronto,²⁶ Clarke had appealed to the court against the finding of a Board of Reference. He had been in the employ

²⁵From a letter received by Miss Nora Hodgins, Secretary of the Ontario Teachers' Federation, from Kimber and Dubin, Barristers and Solicitors, Toronto, dated November 6, 1962.

²⁶[1947] O.W.N. 878 (C.A.)

of the Toronto Board for thirty-three years, latterly as a principal of a Collegiate Institute. He was removed from the principalship by action of the Board but was not dismissed. He continued to teach for the Board. A Board of Reference had found that his demotion did not constitute dismissal, and that, therefore, the provision of the Teachers' Board of Reference Act had not been contravened. The court upheld the finding of the Board of Reference and dismissed the appeal, without ruling on the appropriateness of the appeal in the first place.

In only one other province does the question of termination of designation appear in the legislation. The New Brunswick Schools Act²⁷ specifies that principals come under The Trustees' and Teachers' Board of Reference Act.

III. THE ROLE OF THE BOARD OF REFERENCE

It has already been asserted that the purpose of tenure legislation is to protect teachers from arbitrary dismissal and to offer school boards a means of dispensing with the services of the incompetent and the unfit.

In each of the provinces which has tenure legislation on the statute books, there are claims that teacher organizations played a leading role in having it placed there.²⁸ While studies in depth of the part played by these organizations in the struggle for such legis-

²⁷R.S.N.B., 1952, c.204, s.111 (3).

²⁸Interviews with secretaries of teacher organizations.

lation are generally lacking, Brown's analysis of the development of teacher tenure legislation in Alberta lends a measure of credence to the claims of teacher organization officials elsewhere. Brown states:²⁹

Little doubt can exist that the A.T.A. was the major, if not the only influence for more adequate tenure legislation. No evidence was found of any attempt to improve tenure legislation before the formation of the A.T.A.

The parallel between the board of reference and the courts is significant. Quasi-judicial bodies tend to perform much the same function as do the courts, excepting that they allegedly perform it both more cheaply and more expeditiously. Another advantage claimed for them is that members serving on such boards tend to be more familiar with the particular problems and issues involved than is the case with judges in the courts. This claim would seem to be supported by the fact that usually the members are selected by teacher organizations, school boards, and ministers of education, because of expert knowledge. Archer³⁰ comments on the merits and shortcomings of the quasi-judicial method of adjudicating disputes.

In any event this method has certain advantages over the courts. It is usually quicker and cheaper. It is less technical and, standing outside the tradition of the courts, less formal. And it enables the subject matter to be considered by experts. All these advantages invite the (sometimes) hesitant citizen to claim rights which otherwise he would be less inclined to pursue, and of which he would then feel himself cheated. And if these characteristics render the tribunal somewhat less thorough as a fact finding

²⁹C.K.Brown, "The Development of Teacher Tenure Legislation in Alberta," (unpublished master's thesis, University of Alberta, 1963), p.183.

³⁰Peter Archer, The Queen's Courts (Middlesex: Penguin Books, Ltd., 1956), p.234.

instrument than the formal courts, this may be a necessary sacrifice.

Over against these advantages is set the possibility of bias or partiality, which might arise because of the appointing process. It appears, however, that the proponents of board of reference legislation have been prepared to risk bias in order to have the advantages listed above.

In assessing the efficacy of teacher tenure legislation in Canada one is confronted with the problem of lack of research in this area. Only in Alberta has a detailed study been made of Board of Reference performance.³¹ Swan surveys the legislation, examines the records of hearings, classifies these, and analyses them in terms of annual applications, withdrawals, hearings and decisions. He also discusses grounds for decisions, and notes cases of special interest.

To do likewise for boards of reference across Canada would be far beyond the scope of the present study. What the writer did here was to analyse the data gained in interviews with teacher organization personnel in all the provinces where boards of reference are in operation and to refer where appropriate to Swan's findings.

Informal Proceedings

A number of preliminary steps or stages precede a formal board of reference hearing. Indeed, as will become apparent, these preliminary stages often suffice to settle a potential board of

³¹J.F.Swan, "The Board of Reference in Alberta," (unpublished master's thesis, University of Alberta, 1961).

reference case. In the event a teacher feels that he has been unjustly dismissed he may apply for a board of reference. The general procedure is for the teacher organization office to be notified and for a staff officer to investigate the matter and report to the organization on the question of whether the case warrants the organization's support in a request for a board of reference. In some instances, school boards have been persuaded to reverse dismissal action, in others teachers have been persuaded to accept dismissal without reference to a board. Without exception, teachers may insist on having a hearing before a board with or without the blessing of their provincial association. They may, in fact, apply for a board of reference without even consulting their organization. Ontario organizations report, however, that in practice, the Minister consults the Ontario Teachers' Federation before making a decision to grant or not to grant a hearing.³² In the event the association supports the application it will supply legal counsel and may pay costs. If it does not approve, it will advise on procedure in any case. Instances have occurred where teachers applying for a board of reference, have done so without the support of their organization, have had it granted, and indeed won their case.

While the data on applications, subsequent investigations, informal settlements, and formal hearings are far from complete, certain tendencies and trends are apparent across Canada. Most teacher organizations do not keep a detailed record of all complaints received

³² Interview with Miss N. Hodgins, Secretary-Treasurer, Ontario Teachers' Federation.

in their offices concerning potential board of reference cases, but all report that the number of original complaints far exceeds the number of applications for a board, and the number of applications in turn exceeds the number of actual hearings. Records kept by the Federation of Women Teachers' Associations of Ontario, an Ontario affiliate, shed some light on the matter.³³ In 1962, eighteen Federation of Women Teachers' Associations of Ontario members reported to their organization office that they had been asked to resign. Of these, three requests involved probationary contracts, two involved difficulty in returning to work after maternity leave, four involved difficulty between teachers and parents, one was a case of a woman principal being replaced by a man, and one involved alleged responsibility for an accident on a class field trip. Of the eighteen complaints, eight were disposed of without application being made, ten resulted in applications. Of these ten, seven were settled without a hearing, two applications, one supported by the organization and one not, were refused by the minister, and one further application was refused because of a technicality. So of eighteen complaints, not one culminated in a formal hearing.

The informal manner of dealing with complaints involves discussions between staff officers or local elected representatives of teacher organizations and either their counterparts in the trustee organizations or officials of the local school boards. It follows, of course, that the teacher, around whom the complaint centers, is also

³³Interview with Miss D. Martin, Executive Secretary, F.W.T.A.O.

involved in the discussions. The preliminary investigations usually have two purposes: one, to see if an informal settlement can be arrived at, and two, to see if, failing the first purpose, the teacher's position in the dispute justifies organizational support in a formal hearing. Such support is sometimes refused. One organization reports that since 1938, there have been five formal hearings held where no support was given to the teacher by his association.³⁴ In one of these, the decision favored the teacher; in the other four cases the findings upheld the school board. In provinces where the Minister of Education has authority to grant or to refuse to grant an application for a board of reference,³⁵ the support of the application by the teachers' organization is almost a sine qua non for granting it. This development may have rather serious implications for the legal status of the individual teacher. The very purpose for which quasi-judicial machinery was established, that of providing for an expeditious but proper hearing and weighing of evidence, is in danger of being circumvented. On the basis of a preliminary investigation, conducted informally and often without reference to the requirements of a proper hearing, a teacher's application for a board of reference may fail to gain the support of his professional organization. While it is true that the teacher is free to apply independently for such a hearing,

³⁴Interview with Dr. S.G.B. Robinson, General Secretary, Ontario Secondary School Teachers' Federation.

³⁵Ontario and New Brunswick.

the chances of such independent application being granted is sharply reduced.³⁶ The fact that the number of formal hearings is on the decline in most of the provinces, emphasizes the threat which informal proceedings pose to the individual teacher. A possible safeguard against injustice might be that those responsible for conducting the preliminary investigation be required to report to all concerned, including the individual teacher involved, the reasons for the decision arrived at as a result of the investigation. A serious concern about this matter was evident among many of the staff people interviewed by the writer. Until this concern manifests itself more clearly, both in the legislative requirements and among individual teachers at large, the risk of erosion of individual rights is unlikely to disappear.

Formal Hearings

In the few instances where formal hearings are conducted, seven of the ten organizations reporting such hearings indicate that the decisions tend to be in favor of the teacher. In two others, the Manitoba Teachers' Society and the Federation of Women Teachers' Associations of Ontario, no trend is indicated, while in Alberta the few cases that have been heard in the last ten years have resulted in the action of the school board being upheld. In those provinces reporting a trend in favor of the teacher, teacher organization officials

³⁶Interview with Win Davies, General Secretary-Treasurer, Ontario Public School Men Teachers' Federation.

readily admitted that only in instances where preliminary investigation indicated a fair prospect of a formal decision favoring the teacher would the organization support a board hearing.

The Alberta trend toward upholding school board action is commented upon by Swan.³⁷

It [the trend] may indicate that school boards have become more circumspect in the matter of terminating teacher contracts; that the amount of investigation into complaints from various sources concerning the behavior and performance of teachers has perhaps increased; that superintendents may be exercising an influence towards justice tempered with caution . . . It is clear that school boards have recently been better prepared to defend before the Board the reasonableness of their actions than they were in earlier years.

The large number of hearings in Quebec, a total of 25 in 1963, requires a word of explanation. New legislation establishing board of reference hearings was enacted in 1962 and was immediately tested in a spate of hearings. Swan reports a similar phenomenon in Alberta following a significant amendment to tenure legislation by the new government in 1936.³⁸ In 1937 there were 61 applications for a board of reference and 60 hearings, with 17 decisions upholding the school board's action, and 43 favoring the teacher. Thereafter the number of applicants dwindled and the proportion of withdrawals of application already made, increased. This decline is the more significant inasmuch as it occurred at a time when the teacher population was growing rapidly. Swan notes that in each of five years (1950, 1954, 1956,

³⁷Swan, op.cit., p.85.

³⁸Ibid., p. 83.

1957 and 1959) all of the applications were withdrawn. "This trend," he states, "reflects the increasingly vigorous efforts of the Teachers' and Trustees' Associations to effect 'out of court' settlements, and the increasingly frequent success of these efforts."

It is quite possible that a similar tapering off may occur in Quebec as the years pass.

Any general comment or conclusion regarding the efficacy of the board of reference as an example of tenure legislation is hazardous, particularly in view of the sparseness of accurate and detailed data. It seems evident that it was sought eagerly by teacher organizations. One can only assume that teachers preferred specific quasi-judicial channels to the traditional recourse to the courts. It is noteworthy, however, that there is a significant trend away from submitting cases to a formal hearing. Only in Quebec, where the legislation is but two years old, is there other than very occasional recourse to a board of reference. One might conclude from this that both teacher organizations and school boards have learned from experience what the bounds are within which they may act in respect to tenure questions. It must be recalled, however, that while the number of formal hearings is now very small, the ratio between complaints and hearings, as indicated by Swan, and supported by data gathered for this study, is substantial. It would seem that there is a preference for complaints to be dealt with informally. As pointed out earlier, this has possibly serious implications for the individual teacher. While the existence of board of reference legislation tends to discourage application to the courts (indeed courts have

ruled that in certain circumstances failure to exhaust administrative remedy constitutes grounds for dismissal of an action³⁹) the fact that such administrative remedy is provided for in legislation does not necessarily mean that it is readily available to the individual teacher. Nor is the informal settlement or compromise, as the case may be, the only obstacle to a hearing. In Ontario and New Brunswick, the Minister may on his own authority grant or refuse to grant a board of reference. In Alberta, a person whose dismissal has been approved by the Minister of Education may not even apply for a board.

It appears that inasmuch as teacher organizations sought tenure legislation, they are responsible for seeing that in invoking its provisions, every effort be made to assure the individual teacher who is in difficulty on a tenure issue, that which is his due in any court: due notice, a fair hearing, and full information as to reasons for the decision taken, whether arrived at formally or otherwise. So long as the investigator's role is investigatory and/or mediating only, no objection need be raised.

If, in conducting preliminary investigation, the element of adjudication is injected, the role of the investigator should be at an end. As Garber has said,⁴⁰ "tenure is a right acquired pursuant to law. Consequently this right of a teacher to tenure can only be breached following the statutory method prescribed for so doing."

³⁹Murray v. Ponoka School Trustees (1929) 2 W.W.R. 439, 24 Alta. L.R. 205 [1929] D.L.R. 425 (C.A.)

⁴⁰Supra, p. 137.

IV. LITIGATION

Litigation respecting termination of contract falls into two general categories. There are those cases which are tried in the courts in the absence of legislative provision for administrative or quasi-judicial remedy. They may arise from the fact that the alleged contract was not properly drawn up or executed in the first instance, or they may involve alleged breach of a properly executed contract.

The second general category of cases includes those where administrative or quasi-judicial remedy has been exhausted. In these instances the court is generally called upon to determine whether provisions in the tenure legislation have been strictly adhered to in the out-of-court proceedings. The fact that tenure legislation exists undoubtedly reduces the number of court actions. Yet, as Dedrick has indicated,⁴¹ "tenure laws, being statutes in derogation of the common law, are generally strictly construed." As a consequence, persons who have been unsuccessful in gaining a favorable decision in a board of reference hearing turn to the court as a last resort.

Cases where Tenure Legislation is Absent

It is not the writer's intention in the present study to dwell at length on the cases in the former category. This has been done by

⁴¹D.W.Dedrick, "Common Law Status of Teachers' Contracts of Employment, 1929-1954," (unpublished doctoral dissertation, University of Connecticut, 1955), p. 19. (Microfilm.)

Ross, in "The Courts and the Canadian Public Schools."⁴² In this study, inter alia, he examined all pertinent cases up to 1947, and on the basis of that examination derived a number of principles and conclusions, some of which have been already touched upon in this study, under the heading "Appointment of Teachers." Some of these conclusions are reiterated here.

He noted that the courts had established that the board has a right to dismiss a teacher,⁴³ that action so to dismiss must be corporate,⁴⁴ that there must be a legal meeting of the board for a dismissal resolution to be valid,⁴⁵ that a contract is an essential in an action for dismissal,⁴⁶ and that notice of dismissal must be in accordance with legislative provisions but need not be under corporate seal.⁴⁷ He also noted that in breach of contract cases, the court

⁴²G.J.Ross, "The Courts and the Canadian Public Schools," (unpublished doctoral dissertation, University of Chicago, 1948). (Microfilm.)

⁴³Raymond v. Cardinal School Trustees (1887) 14 O.L.R. 562; Dunn v. Toronto Board of Education (1904) 7 O.L.R. 451.

⁴⁴Robertson v. S.C. #2 Durham (1896) 34 N.B.R. 103.

⁴⁵Greenless v. Picton P.S. Board (1901) 2 O.L.R. 387 (C.A.); Re The School Act and Lacombe District and Stewart [1922] 3 W.W.R. 269.

⁴⁶Birmingham v. Hungerford et al. (1869) 19 U.C.C.P. 411; Lambiere v. Cayuga S. Trustees (1882) O.A.R. 506; Macpherson v. Usborne S. Trustees (1901) 1 O.L.R. 261 (C.A.); MacMurray v. E. Nissouri P.S. Board (1910) 21 O.L.R., 46 (C.A.); Parker v. Lion's Head P.S. Board [1934] O.R.14 [1934] 1 D.L.R. 430 (C.A.)

⁴⁷Smith v. Campbellford Board of Education (1917) 39 O.L.R. 323, 37 D.L.R. 506 (C.A.); Hunt v. Brant S.D. [1926] 2 W.W.R. 431 [1926] 3 D.L.R. 288 (Alta.); Pierce v. Mylor S.D. [1929] 1 W.W.R. 223, 23 Sask.

in assessing damages will usually consider whether the teacher was able to mitigate such damages,⁴⁸ and that where there is evidence of bad faith on the part of the board, the teacher may recover damages.⁴⁹ An English case seems relevant to this final point: in Short v. Poole Corporation⁵⁰ the judge commented as follows:

Thus no public body can be regarded as having statutory authority to act in bad faith or from corrupt motives, and any action purporting to be that of the body but proved to be committed in bad faith or corrupt motives would certainly be held to be inoperative. It may be also possible to prove that an act of the public body, though performed in good faith, and without taint of corruption, was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body, and therefore inoperative.

Only a small number of cases have materialized since Ross completed his study, and these have not added substantially to the principles which he outlined. Two such cases came up in Quebec, one in Nova Scotia, neither of which provinces had tenure legislation at the time. Tenure provisions have since been written into Quebec law.

Assad v. Notre Dame de la Garde⁵¹ involved alleged non-compliance with a statutory provision. S.221 (2) of The Education Act reads:⁵²

L.R. 365 [1929] 3 D.L.R. 49; Richards v. Athabaska P.S. Trustees [1931] 1 D.L.R. 443.

⁴⁸Pierce v. Mylor S.D. (Supra); Richards v. Athabaska (Supra); McCarty v. Dee Valley S.D. [1933] 2 W.W.R. 442 (Sask. C.A.); Albrecht v. Milk River Consol. S.D. [1937] 3 W.W.R. 34 (Alta.)

⁴⁹Appleby v. Hazell Bluff S.D. [1936] 3 W.W.R. 667 [1936] 4 D.L.R. 795 (Alta. C.A.)

⁵⁰[1926] Chancery Div. 66.

⁵¹[1955] Que. S.C. 144.

221. It shall be the duty of school boards:

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2. After mature deliberation at a meeting called for that purpose, to cancel the engagements of teachers on account of incapacity, negligence in the performance of their duties, insubordination, misconduct, or immorality.

Notice that dismissal of the plaintiff would be considered at a particular meeting of the board was not given, and on these grounds and in keeping with the above s. 221 (2) the teacher's position was upheld. She was able to recover, not damages, but salary and that limited to the salary payable under the contract up to the time of the institution of the action, less earnings from other sources in the interval.

A second Quebec case, Laurentia Protestant School Commissioners v. Golding⁵³ involved authenticity of contract. The plaintiff was engaged on December 11th, 1956 at a regular meeting of the school board and released by telegram on December 19th. In the interim, the plaintiff had refused a contract with Shawbridge School Commissioners which would have given him \$2400 for the rest of the year, and he subsequently accepted at \$180 per month, causing him a net loss of \$1,080.

It was held that the contract of employment (which had been signed by both parties), preceded by the resolution of the school board, was binding, and that cancellation without cause, of the contract, by

⁵²R.S.Q. 1941, c.59, s.221 (2).

⁵³(1958) Que. S.C. (Unreported case. Judgment appears in The Teachers' Magazine, P.A.P.T. Vol. XXXIX, 195, February 1959. Montreal, Quebec), p. 44.

the Commissioners, gave plaintiff the right to claim the damages which he sustained by reason of such cancellation. In this case the teacher was vigorously supported by his professional organization, the Provincial Association of Protestant Teachers of Quebec. In the first instance a staff officer interviewed the Commission, in an attempt to arrive at a settlement, but this proved futile. In the court action, the Provincial Association of Protestant Teachers of Quebec provided counsel and paid whatever expenses were involved for the teacher concerned.

It should be noted that while the judgment was in favor of the teacher in both of these Quebec cases, in Assad v. Commissioners, the award was for salary, while in Laurentia v. Golding, the award was for damages. In the one instance the procedure for terminating contract was improper; in the other, the termination itself was illegal.

In MacLeod v. Dominion (Town) School Commissioners⁵⁴ a teacher brought an action for alleged wrongful dismissal or for breach of contract. The plaintiff had been appointed in August on a one-year trial basis by letter and not by contract in the prescribed form. In the following February she received a stencilled letter from the Board with her name typed in, asking any teacher who intended to resign to make it known to the board during the following week. The plaintiff replied in writing that she desired to continue as a member of the staff, but at the end of May she was notified that her services would not be required after the end of the term. In the contract form contained

⁵⁴(1958) 16 D.L.R. (2d) 587 (N.S.)

in a schedule to the Education Act, it is prescribed that if either party wished to terminate the agreement, notice would have to be given to the other party not later than March 31st in any school year. The plaintiff argued that by not notifying her of dismissal until May, the board had broken the agreement. The board denied that it had any such contract with the plaintiff, referring to the letter of appointment which stated that plaintiff was engaged on a one-year trial basis. The judge, in dismissing the action, noted:

There is no legislative provision that every contract made between a board and a teacher shall be deemed to be in the prescribed form or that the provisions set out in the prescribed form shall be deemed to be part of every contract between a board and a teacher . . . It may be that the contract actually made between the parties was void for illegality as in violation of s.138 of the Education Act. But the question is not as to the validity of the contract that was made. The question is as to the right of the plaintiff to recover damages for breach of a contract that was not made, and I must hold that the plaintiff has no such right.

The court also rejected the plaintiff's claim that the correspondence between the board and herself which took place in February constituted a contract for the coming year. The judge indicated that while the teacher's letter to the board indicated that she was available for the school year 1958-59, this did not mean she had a contract with the board.

Clause 7⁵⁵ of the Form of Teacher's Agreement for Towns and Cities, upon which Mrs. MacLeod based her claim for breach of contract, reads:

⁵⁵Schedules to The Education Act, R.S.N.S. 1954, c.78.

To terminate this agreement, Notice in writing shall be given by either party to the other, not later than March 31st in any school year; but, unless both parties mutually agree, this Agreement shall not be terminated before the last teaching day of the school year unless for cause as provided in Section 100 of The Education Act.

It would appear that had such a provision been included in the Act itself rather than in the contract form, the teacher would have been afforded a greater measure of protection.

Cases Pursuant to Tenure Legislation

There are very few cases concerning board of reference legislation in Canada. Of these, three--all Ontario cases--will be examined in some detail.

In Re Clarke and Board of Education of Toronto,⁵⁶ a Board of Reference decision was appealed to the court. Clarke had been a teacher under the Toronto Board from 1914 through to 1947. He had successively been a classroom teacher, mathematics department head, vice-principal, and at the time of the action had been principal of Malvern Collegiate Institute. He was removed from that post and assigned teaching duties at Jarvis Collegiate Institute. He applied for a Board of Reference to question the right of the board so to demote him. He conceded that he had not been dismissed. The Board of Reference Act provided that every dismissal or termination of employment shall indicate reasons. No such reasons had been given, and the Board of Reference held that no dismissal had occurred. In

⁵⁶[1947] O.W.N. 878 (C.A.)

making his case, counsel for the appellant argued that Clarke's duties as principal of Malvern Collegiate Institute did not include any teaching, but only administrative duties. The judge commented that if Mr. Clarke were not a teacher, then the statute in question (The Teachers' Board of Reference Act) had no relation to him, as it dealt only with teachers. If this were so then the entire appeal proceeding would be null. The court upheld the finding of the Board of Reference. The court doubted the propriety of the procedure that the teacher took, but assumed it to be proper.

In appealing the Board of Reference decision, the appellant cited s. 5(1) of The Public Inquiries Act,⁵⁷ which reads as follows:

Where the validity of the commissioner or the jurisdiction of a commissioner or the validity of any decision, order or direction, or other act of a commissioner is called into question by any person affected, the commissioner, upon the request of such person, shall state a case in writing to the Court of Appeals, setting forth the material facts, and the decision of such court thereon shall be binding.

It is by no means certain that the above clause applies to a board of reference. The Board of Reference Act contains a clause granting to a board chairman all the powers conferred upon a commissioner under The Public Inquiries Act, but it also contains a clause⁵⁸ which says:

The direction of the Board of Reference under section 28 shall be binding upon the board and the teacher.

⁵⁷R.S.O. 1937, c.19, s.5 (1).

⁵⁸Teachers' Board of Reference Act, 1946, c.97 (Ont.)

Wagstaffe v. Public School Board of Section 8 of Raglan⁵⁹

gives an interesting interpretation of an attempted application of The Board of Reference Act. This case concerned a teacher who was employed by the defendant board as a teacher for the school year 1946-47 at a salary of \$120 per month. She taught without friction until the end of the calendar year, but in January encountered difficulties when the janitor resigned. The teacher carried on for a short period with the help of the children. The school board then instructed her to close the school until a new janitor could be hired. She did so, but on January 18th, 1947 the school board dismissed her. She sued for salary through June, basing such appeal on alleged breach of contract. The defendant, in addition to pleading that the dismissal was justified, disputed the jurisdiction of the court, relying upon section 3 of The Teachers' Board of Reference Act, c. 42 as amended by the School Law Amendment Act, 1943, c. 6 which provides that a teacher may apply for a board of reference to the Minister. Counsel for the defense argued that under this clause, the teacher was bound to take the case to the Minister rather than sue in the courts. This argument was refuted by the court in these terms:

Per Mulcahy, C.C.J.:

It is worthy of note that ex. 3 gives no reason for dismissal, as appears to be required by the statute. Reasons for the dismissal would appear to be necessary to give the teacher grounds for an appeal to the Minister as set out in the Act. It was argued that the teacher, in case of dispute with the board, is bound to take the case to the Minister under that section rather

⁵⁹[1948] O.W.N. 120 (C.A.)

than sue in the courts. I see nothing in the section which takes away the teacher's right to sue in case of dismissal. The section gives an additional remedy for the speedy settlement of disputes between the teacher and board, but as I see it, it takes away no right of action from either party. There is no evidence that the board, or any member of it, informed Mrs. Wagstaffe of any dissatisfaction with the service she was giving . . .

On the whole I can find no justification for the summary dismissal of this teacher without any reason stated . . .

She is entitled to the six months of salary claimed, \$720, together with costs . . . I might, on the facts here, invoke the penalty clause in the Act against the board, but I have refrained from doing so only because I consider the plaintiff entitled to her full salary for the school year.

The penalty clause to which Mulcahy, C.C.J., referred is contained in The Public Schools Act.⁶⁰ The clause runs as follows:

(7) If it appears to the judge on the trial of an action for the recovery of a teacher's salary that there was not reasonable ground for the board disputing its liability, or that the failure of the board to pay was from an improper motive, he may award as a penalty a sum not exceeding three months' salary.

(8) For the purposes of s.(7) the failure of the board to pay a teacher's salary may be extended by a judge to include failure to pay a teacher's salary when an agreement for his employment has been made by the board but no written agreement has been written into and executed as required by Ss 1, if the judge is satisfied on the evidence that the refusal of the board to pay the salary by reason of the absence of an agreement in writing is without merit.

In the appeal, the appellant argued that because the plaintiff's contract of hiring had not been reduced to writing, she had no remedy, basing their claim on McMurray v. E. Nissouri (Section 3) Public School Board, (1910) O.L.R. 46 and Parker v. Lion's Head Public School Board [1934] O.R. 14 [1934] 1 D.L.R. 430. These judgments held that the absence of a written contract, sealed with the seal of the board, was

⁶⁰1937, c.357, s.106 (7) (8) (Ont.)

fatal to the plaintiff's claim. Roach, J.A., ruled that the enactment of the sections noted above justified a different finding and ruled that the provisions of subsection 8 be invoked. Because there was no written contract, Rand, J.A., ruled that the respondent's remedy was limited to that provided by subsection 8, i.e. three months' salary, or \$360 with the costs of the trial.

One more significant case should be analysed. Lacarte v. Board of Education of Toronto,⁶¹ one of the most celebrated and long fought teacher tenure cases in Canadian history, involved a teacher who had been in the employ of the Board of Education of Toronto for eight years. She began as a French specialist, with a few classes in Art. In 1947 there was a change made in her assignment, giving her more Art and less French. She complained to the principal and became generally dissatisfied. In 1948 she was given notice of termination of her contract by a letter informing her that the Board had approved a recommendation of its Advisory Vocational Committee to terminate her agreement on the grounds of lack of cooperation with the principal and certain members of the staff of a specified school. A Board of Reference was held in 1950 in which the action of the school board was upheld. In 1953 an action was initiated by Miss Lacarte in which she sued for damages for wrongful dismissal and for libel. The action concerning wrongful dismissal was tried separately and was dismissed. Both actions were appealed through to the Supreme Court of Canada, the

⁶¹[1959] S.C.R. 465, 17 D.L.R. (2d) 609 affirming [1956] O.W.N. 844.

wrongful dismissal case being dismissed in 1955,⁶² the appeal regarding libel, in 1959.⁶³ In the action for damages for libel, the plaintiff alleged defamation contained in the board's notice of dismissal which stated that the plaintiff was uncooperative. Plaintiff argued that this statement was seen by typists, clerks and other employees of the Board. The defence claimed that the qualified privilege possessed by school boards in such situations was not lost by such publication, inasmuch as no evidence of malice was shown. The case was dismissed, appealed to the Court of Appeals, dismissed there, and again by the Supreme Court of Canada.

In alleging unjustified dismissal the plaintiff claimed the right to a hearing by the board prior to dismissal. This claim was based upon Capel v. Child,⁶⁴ in which it was established that one holding a public office was entitled to a hearing before he could be deprived of property. In response to this claim, Rand, J., stated:

These clauses [of Ontario legislation] contemplate a contract by which the teacher enters the employment of a Board, and it is the termination of the contract that effects the severance of relations between the teacher and the Board. That is not the position of one holding an office of the nature of those in question in Capel v. Child.

Undoubtedly, in the relation of an employee, the teacher is exposed to the risk of arbitrary, capricious or unjust action by school boards, and, considering the general unity of the administration, a professional career could, within the Province, by one such act, be virtually destroyed. But protection against that possibility must be left to the Legislature.

⁶²[1955] 5 D.L.R. 369.

⁶³[1959] 17 D.L.R. (2d) 609.

⁶⁴[1832] 2 Cr. & J. 558, 149 E.R. 235.

In response to the claim by the appellant that the reasons given by the Board (lack of cooperation by the teacher with the Principal and staff) for dismissing her were inadequate and not in compliance with the requirements of the statute,⁶⁵ Rand, J., made the further comment:

The requirement of reasons contemplates a statement of substance for the personal information and interest of the teacher both in relation to an inquiry before a Board of Reference and her future career. But it does not call for a strict specification of minor particulars which by accumulation make up a pattern of general behavior, and which in ordinary statement, are embodied in a general description reasonably precise in indicating the essence of objectionable conduct. What in the opinion of the school authorities the incidents and attitude of Miss Lacarte did was to create tensions and to corrode relations between her and her associates; I am unable to say that this is not sufficiently indicated by describing it as lack of cooperation.

The appeal was dismissed.

Relevant American Cases

While American court decisions have no binding effect in Canada, they have on occasion been considered in Canadian school cases. In Donald v. Hamilton School Board⁶⁶ the judge, in granting damages arising out of a student expulsion case, considered two American cases: West Virginia Board of Education v. Barnette⁶⁷ and People of the State of New York v. Sandstrom.⁶⁸

⁶⁵Teachers' Board of Reference Act, 1946, c. 97 (Ont.)

⁶⁶[1945] O.R. 518 [1945] 3 D.L.R. 424, reversing [1944] O.R. 475 [1944] 4 D.L.R. 227 (C.A.)

⁶⁷319 U.S. 624.

⁶⁸279 N.Y. 523.

In the area of tenure litigation particularly, American courts have produced some clear cut decisions. A number of such decisions are given here in brief, along with the case reference, because they bear directly on tenure problems of Canadian teachers and because for the most part similar cases have not been considered by Canadian courts. All appear with commentaries in Garber and Edwards' book.⁶⁹

1) A statute providing for tenure does not create a contract between the state and the teachers; so it is generally held. Morgan v. Potter.⁷⁰

2) Teacher tenure statutes are not intended to guarantee positions to teachers regardless of changing conditions. Ehret v. School District.⁷¹

3) A school board may discontinue the employment of teachers on tenure for reasons of economy . . . or for any other good administrative reason. State v. Board of Education.⁷²

4) A board may reassign tenure teachers provided the new work is of equal status and salary and [that] the new assignment is not in fact a demotion. Appeal of Santee.⁷³

5) Tenure status does not guarantee that salary will not be reduced. A board may put into effect a general salary reduction. Smith v. School District.⁷⁴

6) Many courts hold that the marriage of a woman teacher on tenure does not constitute a legal cause for dismissal. State v. Webb.⁷⁵

⁶⁹Garber and Edwards, op.cit., pp. 49-63.

⁷⁰238 Wis. 246, 298 N.W. 763 (1941).

⁷¹333 Pa. 518, 5A (2d) 188 (1939).

⁷²213 Minn. 550, 7 N.W. (2d) 544 (1942).

⁷³397 Pa. 156A (2d) 830 (1959).

⁷⁴334 Pa. 197 5A (2d) 535 (1939).

⁷⁵230 Wis. 390, 284 N.W. 6 (1939).

7) Marriage in and of itself does not constitute a legal cause for breach of contract. Richards v. District School Board.⁷⁶

Informal Settlements

Three dismissal disputes, two in Ontario and the other in Nova Scotia, point to the fact the legislation and the courts do not constitute the only channels through which a teacher may seek redress. In one Ontario case, the teacher remained on the scene and emerged the victor, while in Nova Scotia, flight from the battlefield resulted in less spectacular results.

In Waterdown, Ontario, a teacher was appointed probationally as principal of the 16-room public school.⁷⁷ In February the Board offered to make the appointment permanent. In March, due to a difference of opinion having arisen in the interim between teacher and board, the offer was withdrawn by the Board and in May the Board gave notice of dismissal. Inasmuch as the appointment was probationary there was no appeal to a board of reference. The Board subsequently appointed a principal who did not have all the necessary qualifications to teach in a Public School. The Ontario Public School Men Teachers' Federation complained to the Minister, who invoked the rule that an unqualified

⁷⁶ 78 Ore. 621, 153 P.842 (1915).

Note: For a further examination of American tenure cases, the reader is referred to Thomas J. Emerson and David Haber, Political and Civil Rights in the United States, second edition, Vol. 2 (Buffalo, N.Y.: Dennis and Co., Inc., 1958), pp. 1026-1037.

teacher could not remain more than two weeks in the position. The Board then appointed a retired but qualified person to a one-year contract.⁷⁷

The man who had first been dismissed as principal remained as a teacher for the following year, and the teachers' organization began a campaign to oust the school board. The issue was fought out in the local press with both teacher organization and school board carrying full page advertisements, stating their respective cases. In the ensuing election, a new Board was elected which in May reappointed the dismissed principal to the post he had been offered verbally the previous year.

In another case,⁷⁸ this time a morals case, a court hearing had been arranged for, but the judge agreed to an informal settlement. The judge agreed to dismiss the case if the teacher agreed to request the cancellation of his own certificate, and to leave the town and never return.

In Nova Scotia,⁷⁹ a school principal was dismissed for refusing to carry out the instructions of the school board concerning noon hour supervision. He appealed to the school board for a hearing and was supported by the Home and School Association. The board agreed to rehire him as a teacher provided that he resign his designated position

⁷⁷This account was gathered in an interview with Win Davies, Secretary-Treasurer of O.P.S.M.T.F., February, 1964.

⁷⁸Ibid.

⁷⁹This case was reported by a staff officer of the N.S.T.U., February, 1964.

as principal. He then left the scene, returning to his home in another part of the province. He appealed to the Provincial Cabinet for an interpretation of The Education Act on both points--insubordination, and dismissal. The Cabinet declined to interpret the points, advising court action. Mediation by the Nova Scotia Teachers' Union resulted in the school board's rescinding the motion of dismissal and the principal's submitting his resignation.

V. SUMMARY

Tenure legislation is designed to afford a measure of job security to teachers and to give them some assurance that they will not be dismissed, suspended, or transferred arbitrarily. Good tenure legislation states who is to be covered by the legislation, what the probationary period, if any, is to be, and what are the causes for dismissal. It also establishes procedural rights which should include due notice, statement of charges, and proper procedure for conduct of a hearing.

Eight of ten Canadian provinces have teacher tenure legislation which substantially conforms to the criteria outlined above. Only two provinces have provision for official investigation into termination of designation and even in these two the provision is for ministerial investigation rather than a quasi-judicial hearing. An Ontario case has established that in that province, at any rate, the positions of teacher and principal are not separable as far as tenure provisions are concerned.

Teacher organizations have taken a vigorous lead in pressing for tenure legislation. There is sufficient evidence, however, to justify a conjecture that both teacher organizations and school boards would prefer to settle tenure differences informally rather than to go through the formal procedure connected with a board of reference. While individual teachers may fly in the face of an organization decision not to support their application for a board of reference, there are grounds for believing that lack of organization support is often fatal to an application for such a hearing.

While it is obvious that teacher organizations need to inform themselves as to the circumstances surrounding a member's application for a board of reference before committing themselves to unqualified support of such an application, the greatest possible care must be taken to see to it that such informal preliminary proceedings be either mediating in nature, or simply investigatory. Under no circumstances should an adjudicating function be exercised except where the greatest care has been taken to protect the rights and the interests of the parties involved. The danger of infringing upon the rights of the individual in order to protect the image of the collectivity is ever present, especially so when the social order is characterized by mass organization and big government, and school affairs by powerful interest groups. As a consequence, teacher organizations, having sought such legislation, must ensure that its provisions be utilized whenever the interests of the individual teacher demand it.

Litigation regarding tenure is not extensive, but it has been

established that while in certain circumstances administrative remedy (i.e. appeal to a board of reference) must be exhausted before turning to the courts on a tenure issue,⁸⁰ board of reference cases have come before courts. In general the court in such circumstances will review points of law and procedure but not of fact. Courts have affirmed and reaffirmed the legal right of a board to dismiss a teacher, provided the provisions of the statutes have been complied with.

⁸⁰Supra, p. 57.

CHAPTER VII

THE LEGAL STATUS OF THE TEACHER REGARDING PROFESSIONAL CONDUCT

I. INTRODUCTION

As was indicated at the beginning of this study, one of the characteristics commonly associated with a profession is that its members belong to a professional organization and subscribe to a professional code of ethics. The purpose of the present chapter is to examine briefly the codes of ethics which teacher organizations in Canada have prepared, to include a cross-section of provisions contained in those codes, and to assess the machinery which the teachers have devised for requiring members to adhere to the codes they have adopted.

Each teacher organization has provided for a discipline or professional relations committee. The manner in which these committees, sometimes referred to as "domestic tribunals," operate is, for the most part, established in law. Their investigatory and judicial function establishes them as quasi-judicial bodies. The extent of their powers is referred to briefly in Chapter III.

The present purpose is to present a rationale for the disciplinary process employed by teacher organizations, to discover whether it has characteristics which are unique to the teaching profession, and to note the basic differences between these domestic tribunals and those

quasi-judicial bodies which were analysed under other headings in this study. The components of the disciplinary process are analysed and criteria against which to assess current practice by teacher organizations in Canada are presented.

Tables of legislative provisions are presented to enable the reader to note the differences and similarities among provinces which obtain at the present time. Comments are made on these tables where appropriate.

Data regarding present practices of disciplining members are presented and analysed. Trends are noted where present, and reference is made to the apparent tendency for teacher organizations to prefer informal proceedings for dealing with alleged unprofessional conduct to the formal processes established by legislation. The methods employed to publicise the findings of disciplinary hearings are also considered.

Some of the teacher organizations have a Professional Relations Commission whose function it is to deal with purely internal friction and dispute. It has a counselling rather than a disciplinary function.

Some emphasis is given to the place of judicial review of these proceedings, with a general comment upon those matters with which the courts are concerned. While very few Canadian cases bear on this issue, the highly significant Owens case in California is considered at length.

In conclusion some attempt is made to assess the impact of current legislation and prevailing practice in the area of professional conduct upon the legal status of the individual teacher.

II. CODES OF ETHICS

Each of the teacher organizations in Canada has prepared a code of ethics to serve as a guide to professional conduct. While the format of these codes may vary, in substance the codes tend to embrace four categories of relationships. These four categories are: (1) teacher-pupil; (2) teacher-teacher; (3) teacher-board; (4) teacher-profession and professional organization.

Representative provisions in each of these categories have been selected from among the codes which are at present subscribed to in the organizations across Canada, as well as provisions of special interest which are unique to a particular organization.

The list is by no means exhaustive but is intended to include those clauses from which disciplinary action might flow.

(1) Teacher pupil relationships:

The teacher shall speak and act towards pupils with respect and dignity and shall deal judiciously with them, always mindful of their individual rights and sensibilities.¹

Impartiality should govern all relations between teacher and pupil.²

He [the teacher] will pursue professional objectives in his teaching, in his discipline, or in his general relations with pupils.³

¹British Columbia Teachers' Federation.

²Newfoundland Teachers' Association.

³La Corporation des Instituteurs et Institutrices Catholiques du Quebec.

(2) Teacher-teacher relationships:

The teacher studiously avoids unfavorable criticism of an associate except when made to proper officials, and then only in confidence and after the associate has been informed of the nature of the criticism.⁴

The teacher shall not accept a position arising out of the unsettled dispute between a teacher or teachers, and local authorities.⁵

Members should refrain from personal deprecation of another member based on the nature of his qualifications to teach.⁶

(3) Teacher-board relationships:

A teacher honors an agreement, written or verbal, with a Division or a District Board.⁷

A teacher will notify all boards to which he has sent applications as soon as he has accepted another position.⁸

The teacher should not accept a salary below that which he would receive according to the scale negotiated between the Nova Scotia Teachers' Union and the School Board.⁹

(4) Teacher-professional organization relationships:

A teacher should engage in no gainful employment, outside his contract, where the employment affects adversely his professional status, or impairs his standing with students, associates, and the community.¹⁰

⁴Alberta Teachers' Association

⁵Nova Scotia Teachers' Union

⁶Ontario Teachers' Federation

⁷Manitoba Teachers' Society

⁸Saskatchewan Teachers' Federation

⁹Nova Scotia Teachers' Union

¹⁰New Brunswick Teachers' Association

It is unethical for a teacher to accept a position with a school board whose relations with the Provincial Association of Protestant Teachers of Quebec are unsatisfactory.¹¹

The teacher shall examine the conduct of all Federation business, and within the Federation make such criticisms as the facts may warrant, but shall refrain from making damaging charges against a local association, the Federation, or their officers by public utterance.¹²

Clauses of particular interest and which were not common to the majority of the codes include:

He [the teacher] will incite the best and most apt scholars to take up the teaching profession and will seek to preclude those who are unqualified.¹³

The teacher should observe a reasonable and proper loyalty to the internal administration of the school.¹⁴

It is considered ethical for a teacher to concern himself with the recruitment of suitable personnel for the profession.¹⁵

A member who undertakes work in an occupation outside the teaching profession should be prepared to become a member of the union or professional association which regulates the conduct of the members of the occupation, and the rates charged.¹⁶

In addition to the general provisions included in the codes of ethics or standards of professional conduct, some organizations have written into their by-laws, clauses specifying behavior as unbecoming,

¹¹Provincial Association of Protestant Teachers of Quebec

¹²British Columbia Teachers' Federation

¹³La Corporation des Instituteurs et Institutrices Catholiques du Quebec

¹⁴Nova Scotia Teachers' Union

¹⁵Newfoundland Teachers' Association

¹⁶Ontario Teachers' Federation

improper, or unprofessional conduct. The following clauses appear in the by-laws under the teaching profession acts of both Alberta and Saskatchewan:¹⁷

Every member shall be deemed guilty of professional misconduct or conduct not becoming to a teacher, who:

a) wilfully takes, because of animosity or for personal advantage, any steps to secure the dismissal of another teacher;

b) wilfully circulates false reports, derogatory to any fellow teacher or to any other person directly associated with education in the province of [Alberta] Saskatchewan;

c) maliciously, carelessly, irresponsibly, or otherwise than in fulfilment of official duties, criticizes the work of a fellow teacher in such a way as to undermine the confidence of the public and the pupils;

d) publishes or circulates any false or mischievous statement or enters into any collusive arrangement intended to circumvent or nullify any Acts of the Legislature pertaining to teachers or the Regulations of the Department of Education;

e) where he is one of a local group, bargains on his own behalf on questions affecting members of the group as defined by bylaws, rules or regulations made under subsection (3) of section 20;

f) is addicted to the excessive use of intoxicating liquors or the excessive or habitual use of opiates or narcotics as defined in the Opium and Narcotic Drug Act (Canada) and amendments thereto;

g) has been convicted of an offence under the Criminal Code.

It is obvious that some of the provisions given above would be more likely to lead to disciplinary action than would be the case with some others. Teachers may be and indeed sometimes are disciplined for breach of contract, or for wilfully maligning another teacher,

¹⁷ By-Laws Relating to Discipline, A.T.A. Handbook, s. 3(2), p.221; The Teachers' Federation Act, R.S.S. 1953, c.183, s.36(2).

but one finds it difficult to see how a teacher might be proven guilty of failing "to incite the best and most apt scholars to take up the teaching profession." Also it is unlikely that a member of a teacher organization would be disciplined for failure "to criticize the conduct of Federation business." Concern here lies with the consequences that ensue when a serious breach of a code of ethics occurs.

III. DOMESTIC TRIBUNALS

As is the case with many other professional associations, teacher organizations in Canada have established tribunals for dealing with members who persistently or flagrantly violate established standards of professional conduct. These tribunals, clothed with broad investigatory and judicial powers, while not responsible for deciding the final penalty to be assessed, do have the power of determining guilt or innocence, and do recommend to the executive committees of the associations the nature of the penalty they believe should be meted out.

Definitions

Before embarking upon an analysis of the disciplinary process as it operates in professional organizations it is appropriate to establish the meaning of some of the terms which will be used rather frequently.

Domestic Tribunal. This is the name given to discipline committees established by voluntary organizations in general and by professional associations and labor unions in particular. As applied to a teacher organization Discipline Committee, the term is something of

a misnomer, inasmuch as such a committee operates partly in the interests of the teachers themselves and partly to protect the public from the consequences of professional misconduct. Sir Carleton Allen questions the appropriateness of the term but does not reject it when he states:¹⁸

In these cases [organizations which exist to protect and promote trades, industries, and professions important enough to attract the attention of Parliament], the term "domestic" is merely one of convenience and the disciplinary bodies concerned are really special cases under the general law of the land. It is very rarely that--like the Inns of Court and the Stock Exchange--they are virtually exempt from legal control.

It is interesting to note that in two recent listings¹⁹ of organizations having domestic tribunals, one British, the other Canadian, teacher organizations were not included. Despite these reservations, however, the term "domestic tribunals" is used here to denote the kind of discipline committees under review.

Complaint. This word is used in its popular or non-legal sense to refer to initial objection raised by a complainant as to alleged professional misconduct.

Charge. This term is used in the restricted sense meaning the legal document upon which a hearing is conducted.

¹⁸ Sir Carleton K. Allen, Administrative Jurisdiction (London: Stevens & Sons, Ltd., 1956), p.47.

¹⁹ The British Journal of Administrative Law, June 1955, p.124; and "Report on Disciplinary Procedures of Statutory Professional Tribunals," Mimeographed report by the Ontario Sub-section of the Civil Liberties Section of the Canadian Bar Association, Appendix A, 1962.

Rationale

It is in the best interests of teachers, school boards, pupils, and the general public that members of the teaching profession adhere to an acceptable standard of professional conduct. A statement²⁰ by the British Attorney General in a House of Commons debate (Hansard, Vol. 615, December 16, 1959) concerning the Medical Discipline Committee points to the public interest:

I want to emphasize what has already been said . . . that in discharging its duty, that Committee acts not just in the interests of the medical profession, but in the interests of, and for the protection of the public. Just as it is important in the public interest that fraudulent and dishonest lawyers should not be allowed to carry on their professions, so it is important for the protection of the public that doctors guilty of infamous conduct should not be permitted to carry on their careers.

By the same token, it is in the public interest that professional misconduct on the part of teachers, whether in the form of breach of conduct, moral turpitude, or maltreatment of pupils, be dealt with in a just and expeditious fashion. Experience has proven that to make such assertions is not a guarantee that universally acceptable professional conduct will ensue, whether the profession be that of teaching, preaching, healing the sick, or providing legal counsel. Because of the importance of their function, the discipline committees which are established to deal with wayward practitioners have very great powers. Indeed, in some instances, their findings lead to decertification. This means, of course, denying a person's means of earning a livelihood

²⁰Quoted in Canadian Bar Association, op.cit., p.2.

in his chosen career. While it seems essential both in the interests of the autonomy of the professions and of protecting the public from fraudulent practice, that such power be given to a disciplining authority, it is no less essential that every care be taken to see that a person charged with professional misconduct be given a fair hearing.

It has been said²¹ that deciding a dispute according to law means observing the rules laid down to ensure that it shall be decided justly.

Justice, like truth, lies at the bottom of a well, and procedure is the ladder by which it is reached.

Before taking up the question of procedure for domestic tribunals, a comment on the relationship between such a tribunal and its parent organization is in order. The Franks Committee, reporting on administrative tribunals and enquiries in Great Britain, commented upon tribunals as machinery for adjudication.²²

Tribunals are not ordinary courts, but neither are they appendages of Government Departments. Much of the official evidence gathered in the Committee study . . . appeared to reflect the view that tribunals should properly be regarded as part of the machinery of administration, for which the Government must retain a close and continuing responsibility. Thus, for example, tribunals in the social service field would be regarded as adjuncts to the administration of the services themselves. We do not accept this view. We consider that tribunals should properly be regarded as machinery provided by Parliament for adjudication rather than as part of the machinery of administration. The essential point is that

²¹Peter Archer, The Queen's Courts (Harmondsworth, Middlesex: Penguin Books Limited, 1956), p. 156.

²²Report of the Committee on Administrative Tribunals and Enquiries (London: H.M. Stationery Office, July, 1957), p.9, Cmd. 218.

Parliament has deliberately provided for a decision outside of the Department concerned, either at first instance, or on appeal from a decision of a Minister or an official in a special statutory position. Although the relevant statutes do not in all cases expressly enact that tribunals are to consist entirely of persons outside the Government service, the use of the term "tribunal" in legislation undoubtedly bears this connotation, and the intention of Parliament to provide for the independence of tribunals is clear and unmistakable.

While a Discipline Committee has a different function from that of an administrative tribunal of the type referred to by the Franks Committee, there seems to be a parallel in the relationship between such a tribunal and the Department of Government concerned, on the one hand, and the relationship between a Discipline Committee and the Executive of a teachers' organization, on the other. A Discipline Committee is not an adjunct of the teacher organization service to its membership. Rather it is machinery sanctioned by the legislature and approved by the general membership of the teacher organization for the purpose of adjudicating an allegation of professional misconduct on the part of a member of the association. For this reason, it is of the greatest importance that its function be clearly defined and the procedure whereby this function is realized set out in such a fashion as to give maximum assurance of "openness, fairness, and impartiality."

At the same time, due notice should be taken of the difference between a discipline committee and those quasi-judicial bodies discussed in Chapter V and Chapter VI. Both a Board of Arbitration and a Board of Reference are tripartite bodies, appointed usually by the Minister from nominations submitted by each of the parties to the dispute, with the Chairman being appointed either by the two already

named, or failing that, by the Minister himself or by a judge. A discipline committee, on the other hand, is usually named from the membership of the organization itself, and usually appointed by the executive of the organization. While such a practice is desirable if professional autonomy is to be safeguarded, it imposes an additional responsibility upon all concerned to strive for the impartiality without which justice cannot be done.

A report recently prepared by the Ontario sub-section of the Civil Liberties Section of the Canadian Bar Association is devoted to a study of disciplinary procedures of statutory professional tribunals. While it does not refer to the discipline committees of teacher organizations, many of the observations, findings, and conclusions arrived at seem applicable to the teaching profession. In particular, their reference to common practice among organizations sounds a familiar note.²³

There is at present no common procedure followed by disciplinary tribunals. The various practices appear to have grown in a "hodgepodge" manner, sometimes by statute, sometimes by regulation, and sometimes by by-law. Some tribunals provide for a right of appeal; others do not. Some require a complaint under oath; for others, an oral complaint is sufficient. Some have the power to administer an oath; others have no such power.

While this report is not considered by its authors as being definitive, it goes far in shedding light upon a confused picture, and offers a set of suggestions upon which an effective disciplinary process may be constructed. It breaks down the disciplinary process

²³Canadian Bar Association, op.cit., p. 1.

into four divisions which are as follows: (1) composition of the tribunal; (2) procedure prior to hearing; (3) procedure at the hearing; and (4) appeal. Under each heading current practice is analysed and recommendations for future practice are made. Their chief recommendations are included here both as a basis for assessing current practice in teacher organizations, and, where adaptable to the teaching profession, as recommendations to be considered by teachers concerned with improving the disciplinary process.

Composition of Tribunal. With regard to composition of the tribunal, no recommendations are made concerning method of appointment, numbers of members, quorum, tenure, etc., of the Discipline Committee. While agreeing that an independent tribunal would be felt by the professions to be inconsistent with their dignity and tradition of autonomy, they point out the merits of having a relatively independent body to deal with disciplinary matters. Referring to the matter of filling vacancies that occur on a functioning tribunal, they say that "it is not necessary that all that hear must decide, but it is imperative that those who decide must hear all."²⁴ On the question of impartiality of the tribunal, the report notes difficult problems. One of these relates to the question of previous association of a member of the Discipline Committee with the conduct being complained of. In the event a hearing is preceded by a preliminary investigation, the authors of the report believe that no member of the investigating body should

²⁴Ibid., p.5.

also be a member of the Discipline Committee. They cite S.A. deSmith who, speaking of an investigating officer, points out the common law position:²⁵

He is, however, disqualified [from membership on the Discipline Committee] if he has voted in favor of a resolution that the proceedings be instituted; for he is then in substance both judge and party.

The implication from such a statement is that the investigating committee is, in fact, a party to the hearing and as such has no right to sit in judgment. As the report points out, the decision as to whether a complaint should come before the Discipline Committee, should be made by parties other than those who are going to deal with the charge.

There is approval of the idea of disciplinary tribunals having legal advice in the conduct of hearings. This position is supported by a report²⁶ recently presented to the British House of Commons:

We think it is essential that any disciplinary tribunal should have available to it legal advice not only for assistance in the conduct of its hearings generally, but for its guidance in ruling on the admissibility of evidence and claims of privilege.

Procedure prior to the hearing. The Bar Association report recommends that no specified form of complaint is essential. It need not be under oath, and may be submitted anonymously. Nor was there any recommendation regarding the matter of investigation save that it not be done by a member of the Discipline Committee.

The formal "charge" as distinct from a complaint, must be

²⁵S. A. deSmith, Judicial Review of Administrative Action, p.156. Quoted in Canadian Bar Association, op.cit., p. 6.

²⁶Report of the Departmental Committee on Powers of Subpoena of Disciplinary Tribunals (London: H.M.Stationery Office, May 1960), p. 6, Cmnd. 1033.

submitted in writing, specifying the nature of the complaint with sufficient detail to permit the member on charge to prepare for the case he is to meet. It must also specify the time and place of hearing. While admitting problems associated with such a procedure, the report carries a recommendation that the investigatory officer or group must be given the discretion to decide whether the matter should come formally before the Discipline Committee. In the final analysis the charge must bear the signature of an officer of the association or of the investigative body.

Procedure at the hearing. If the charge has been properly delivered it is considered appropriate to proceed with the hearing in the absence of the person charged. The complainant is given no particular rights except those of a witness. It is recommended that hearings be held in camera unless both the tribunal and the person charged wish that it be held in public.

The report indicates that it is essential that the member charged be given the express right to attend at the hearing, to give evidence, and to be represented by counsel. There is also strong support for the granting of subpoena powers to disciplinary tribunals. Again, the English Departmental Committee report is unequivocal.²⁷

²⁷Ibid., p. 3.

At the beginning of this Report we assert the principle which has guided us throughout. It is that in the administration of justice it is essential that the Court or tribunal should have before it all the relevant evidence that is possible. Justice cannot be done or be seen to be done, if relevant evidence is withheld and is known to be withheld and there is no power to compel it to be given. . . . It is a commonplace that not all the formal practice and procedure of a court of law are necessary to the proper administration of a disciplinary tribunal but, there are certain common attributes of all Courts and tribunals. Amongst them we put the need to ensure that relevant evidence shall not be withheld.

As a protection against the mischievous or malicious subpoena of witnesses, a motion to set aside the writ of subpoena may be made, and if successful, the litigant would probably have to pay the expenses of the proceedings to set aside.

Regarding the power to administer oaths, the report of the Bar Association indicates that such power should be granted in the legislation.

Rules of evidence need not be imposed upon a disciplinary tribunal. There is precedent for this position. Viscount Simon, L.C., in General Medical Council v. Spackman²⁸ states:

It is not disputed that the General Medical Council, in exercising this jurisdiction is not a judicial body in the ordinary sense. It is master of its own procedure and is not bound by strict rules of evidence.²⁹

"The nature of the evidence presented," the report concludes, "will depend upon the nature of the hearing. All that can be said is

²⁸[1943] A.C. 627.

²⁹This matter is treated at length in Board of Public Utility Commissioners v. Model Dairies (1936) 3 W.W.R. 601.

that the tribunal act reasonably in a common sense manner."³⁰

In the matter of argument, it is submitted that it may be oral or written.

The authors felt that the decision arrived at by majority vote, should be in writing, with reasons, and should be sent to the accused or his counsel.

The report indicates that while the deciding body, to which the Discipline Committee reports, should be at liberty to change the penalty, it should not be at liberty to say that the Discipline Committee was wrong in dismissing the charge on the facts or finding that the facts did not amount to unprofessional conduct. It also opposed sending the matter back for re-hearing.³¹

Provisions for Appeal. Regarding the matter of appeal the Bar Association report favors simply a check on disciplinary tribunals "so that they maintain decency in their procedure and do not come up with results that are unreasonable." It is recommended that the proper body to review these questions would be the Provincial Court of Appeal.

In summary, then, the criteria submitted as being acceptable for the conduct of Discipline Committee hearings are as follows:

A. Composition of the Tribunal

- 1) A committee appointed with as much independence as is consistent with the autonomy of the profession;
- 2) All those participating in the decision must have attended all the sessions of a hearing;

³⁰Canadian Bar Association, op.cit., p.13.

³¹Ibid., p.16.

- 3) Members of the committee should not have participated in the preliminary investigation;
- 4) A disciplinary committee should have legal counsel concerning conduct of the hearings and for guidance on the admissibility of evidence.

B. Procedure prior to Hearing

- 1) A "complaint" may be in writing, or may be oral, and may be anonymous;
- 2) The profession should have power to suspend a member from practice during the period of investigation;
- 3) A "charge" must be in writing, stating the grounds sufficiently clearly to enable the member to prepare a defence, and it should specify the date and place of the hearing;
- 4) Discretion as to whether a "complaint" should issue in a formal "charge" and hearing should lie with the investigating body.

C. Procedure at the Hearing

- 1) Hearings should be in camera unless otherwise requested by the committee and the person charged;
- 2) The person charged should have right to counsel;
- 3) The committee should have right to subpoena witnesses, administer oath, but have discretion as to rules of evidence;
- 4) Argument may be oral or written, with a record of the evidence kept;
- 5) The decision should be by majority vote of the committee and a reasoned judgment delivered to the accused and/or his counsel;
- 6) In the event the executive or board of directors of the organization receive the decision and recommendations from the committee, they may have power to revise the penalty, but should not be permitted to alter the decision of guilt or innocence.

D. Provisions for Appeal

- 1) Some external check is required;
- 2) Power of review should lie in a Provincial Court of Appeal.

With respect to provision for appeal, the Franks Committee, reporting on Administrative Tribunals in general, as contrasted with "domestic" tribunals, recommends that there be two stages of appeal, the one being a higher tribunal than the tribunal of the first instance, the second and final appeal being to the Appeal Court. A statement appearing in the Franks Committee's Report merits inclusion here:³²

The existence of a right of appeal is salutary and makes for right adjudication. Provision for appeal is also important if decisions are to show reasonable consistency. Finally, the system of adjudication can hardly fail to appear fair to the applicant if he knows that he will normally be allowed two attempts to convince independent bodies of the soundness of his case.

An appeal to the courts of matters of fact would not, we think, be desirable since it would constitute an appeal from a body expert in the particular subject to a relatively inexperienced body. In the absence of special considerations, we consider that the ideal appeal structure for tribunals should take the form of a general appeal from a tribunal of the first instance to a second or appellate tribunal. By a general appeal we mean an appeal on facts, law or merits . . . As a matter of principle we consider that appeal should not lie from a tribunal to a Minister.

It is a matter for teacher organizations to consider whether having an appellate tribunal would be a serious infringement on their autonomy. It is the writer's view that provided the standing and competence of the latter are sufficiently above those of the tribunal of the first instance, the existence of an external appeal body is desirable. This is especially so as one considers the legitimate interest which the public has in the outcome of such appeals. An

³²Report of the Committee on Administrative Tribunals and Enquiries (London: H.M. Stationery Office, 1957), paragraphs 104 and 105, p.25, Cmd. 218.

effective means of assuring a measure of status for the appellate tribunal would be to require the appointment of a judge as its chairman.

Finally, the Franks Committee recommends that all decisions of appellate tribunals be subject to review by the courts on points of law.³³ This question is considered later when significant cases are discussed.

IV. STATUTORY AND OTHER PROVISIONS FOR DISCIPLINING CANADIAN TEACHERS

Provisions for the disciplining of Canadian teachers by their professional organizations constitute a Joseph's coat of many colors with a few dominant shades running through the piece. The tables submitted below reveal that where pattern does exist, it tends to be confined within regions and is not uniform throughout Canada. This is as was hypothesized in the beginning. The tables are by no means exhaustive of the provisions, some of which are contained in statutes, others in by-laws, and still others in regulations. In some instances, alas, the provisions are so informal as not to be committed to paper at all!

In the discussion which follows, the procedure is to comment upon each provincial organization with respect to provisions outlined in both Table V and Table VI. In addition, observations regarding strengths and weaknesses of provisions in operation in particular organizations, are offered as they seem appropriate.

³³Ibid., paragraph 107, p.25.

TABLE V

PROVISION FOR DISCIPLINE PROCEDURES

| Organization | Name of Disciplinary Body | Statutory Authority | Sanctions | Preliminary Investigatory Body | Appeal Body |
|--------------|--|--|--|---|---|
| B.C.T.F. | Code of Ethics Committee | <u>Public Schools Act</u> | Reprimand, suspension or expulsion from membership | Sub-Committee of Executive of B.C.T.F. | General meeting of B.C.T.F. and Council of Public Instruction |
| A.T.A. | Discipline Committee | <u>Teaching Profession Act</u> and By-laws | Reprimand, suspension or expulsion from membership | Staff officer on direction of Executive Council | Teaching Profession Appeal Board |
| S.T.F. | Discipline Committee | <u>The Teachers' Federation Act</u> | Reprimand, recommendation of suspension or cancellation of certificate to Minister | Staff officer under direction of Executive | Minister of Education |
| M.T.S. | Judicial Committee | <u>M.T.S. Act</u> and By-laws | Reprimand, suspension of membership, recommendation of cancellation of certificate to Minister | Ideals and Practice Committee | No provision |
| O.T.F. | Relations and Discipline Committee | <u>The Teaching Profession Act</u> | Reprimand, recommendation of cancellation or suspension of certificate | Affiliate organization | O.T.F. Executive O.T.F. Board of Governors |
| C.I.C. | Discipline Committee | <u>C.I.C. Act</u> By-laws | Censure, suspension or expulsion from membership | Staff Officer | General Council of C.I.C. |
| P.A.P.T. | <u>Ad hoc</u> Committee | P.A.P.T. Charter | Reprimand, suspension or expulsion from membership | Staff Officer | Protestant Committee on Education |
| N.B.T.A. | Professional Conduct and Standards Committee | Non-statutory Association Regulations | Reprimand, recommendation of suspension or cancellation of certificate | Secretary-Treasurer of Association | Board of Directors |
| N.S.T.U. | Professional Committee | <u>N.S.T.U. Act</u> | Suspension or revocation of certificate of membership | Professional Committee | No provision |
| P.E.I.T.F. | Ethics Committee | Non statutory | None specified | Ethics Committee | No provision |
| N.T.A. | Executive Committee | Non statutory | No formal provision | Staff Officer | No provision |

TABLE VI
DISCIPLINE COMMITTEE HEARING PROCEDURES

| <u>Organization</u> | <u>Right of member to legal counsel</u> | <u>Power of committee to subpoena</u> | <u>Power to administer oath</u> | <u>Method of promulgation of decision</u> |
|---------------------|---|---|---------------------------------|--|
| B.C.T.F. | No formal procedure prescribed | | | |
| A.T.A. | Yes | Yes | Yes | Reported to member by Executive Secretary |
| S.T.F. | Yes | Yes | Yes | Reported to member by Secretary-Treasurer |
| M.T.S. | Teacher counsel only | No provision | No provision | Reported to member and published in teachers' magazine |
| O.T.F. | No provision | No provision | No provision | Member notified by registered mail |
| C.I.C. | Yes | No provision | No provision | Reported to member and may be published in teachers' newspaper |
| P.A.P.T. | Yes | No provision | Yes | Reported to member by mail |
| N.B.T.A. | Yes | No provision | Yes | Reported to member by mail |
| N.S.T.U. | Yes | No statutory provision but witnesses are in fact summoned | No provision | Member notified by registered mail |
| P.E.I.T.F. | No formal procedure prescribed | | | |
| N.T.A. | Yes | No provision | No provision | Member notified by mail |

British Columbia Teachers' Federation

The Executive Committee of the British Columbia Teachers' Federation is empowered by the Public Schools Act³⁴

. . . to suspend or expel any teacher from membership in the B.C.T.F., and no person so suspended or expelled shall be employed as a teacher in any public school until he has been reinstated as a member of the B.C.T.F.

This power is elaborated upon in the By-laws of the Federation as follows:³⁵

The Executive Committee [of the Federation] shall have power to:

- a) refuse membership; or
- b) terminate the membership of; or
- c) suspend the membership of; or
- d) reprimand any member; and to
- e) reprimand or suspend any Local Association who or which, in the opinion of the Executive Committee, has been guilty of conduct inimical or prejudicial to the interests or objects of the B.C.T.F., provided, however, that such Association or member shall have right to appeal from the decision of the executive to the next general meeting (annual or otherwise) which may confirm or reverse or modify such decision.

While the power of the British Columbia Teachers' Federation to discipline its members is thus clearly established, there is no provision either in legislation or in the by-laws of the Federation regarding the manner in which such disciplinary action is to be carried out. This does not mean, of course, that informal procedures have not been worked out and applied, but in the absence of specifically stated procedures associated with the conduct of a proper hearing, reliance on the principles of common sense alone leaves something to be

³⁴ 1958, c.42, s.146(1) (B.C.)

³⁵ s.15(7), By-laws, B.C.T.F. Constitution, B.C.T.F. Handbook, 1963-64, p. 27.

desired. Such informal procedures as do govern disciplinary action are not without deficiencies. The Executive Committee constitutes the discipline committee and in the event a complaint is made concerning alleged unprofessional conduct, a preliminary investigation, conducted usually by a staff officer, is made.³⁶ A sub-committee of the Executive, comprising the Past President as chairman, and other specified members of the Executive, determines on the basis of the preliminary investigation whether in fact grounds for a charge exist. If a charge is laid, a hearing is conducted by the Executive and a decision made both as to verdict and penalty. If the charge concerns a morals question, it goes before a court and if the court finds the person charged to be guilty, the Department of Education cancels his certificate. A safe-guard for the person found guilty of unprofessional conduct lies in his right of appeal to the Council of Public Instruction. In the event such appeal is made, the British Columbia Teachers' Federation must³⁷

. . . send a statement by way of reply to the statement of grounds of appeal sent by the teacher, and shall at the same time send by registered mail a copy thereof to the teacher.

The Council of Public Instruction may investigate the subject matter of the appeal or refer the appeal to a Board of Reference for hearing and report. On the basis of such investigation or hearing, the Council may confirm or reverse the action of the executive committee of the British Columbia Teachers' Federation.

³⁶Interview with William Allester, Staff Officer, British Columbia Teachers' Federation.

³⁷Public Schools Act, 1958, c.42, s.146 (B.C.)

The British Columbia Teachers' Federation also has what is called a Professional Relations Commission.³⁸ It is a continuing committee of the Federation, comprising the President, General Secretary, a principal and teacher of both an elementary and a secondary school. It has no disciplinary authority. Its purpose is to restore relationships rather than to assess blame for a conflict. It has two main functions: (1) to attempt to resolve within the professional family, disputes of the kind which, if left unattended, could result in serious ethics or tenure cases; (2) generally to promote the establishment of such sound personnel practices as will tend to eliminate sources of friction.

Officers of the Federation indicate that effective work done by this Commission has sharply reduced the work load of the Discipline Committee.³⁹

Alberta Teachers' Association

In Alberta, provision for dealing with disciplinary cases is much more specific and formal. By-laws of the Association, approved by the Lieutenant Governor-in-Council, provide that the Executive Council shall appoint a committee of five, irrespective of whether they are members of the Executive Council, to act as a Discipline Committee.⁴⁰

This committee may employ legal or other assistance it thinks

³⁸B.C.T.F. Handbook, 1963-64, p.53.

³⁹Interview with William Allester, Staff Officer, British Columbia Teachers' Federation.

⁴⁰By-laws Relating to Discipline, A.T.A. Handbook, 1963, p.210.

necessary and in the event an inquiry is to be held, notice must be sent two weeks before the holding of such inquiry to the person whose conduct is the subject of inquiry, along with a statement of the charges made against him or of the subject matter of the inquiry.

Complaints of unprofessional conduct, or requests for an investigation, may come from a member, a local of the Association or a school board. Anyone may lay a charge. The Executive may accept or reject a request for an investigation but in the event a charge is laid, investigation is mandatory. If the decision is to investigate, an investigating officer is sent out to determine if further action is called for. Following such preliminary action, the Executive may order an official hearing. For the purpose of conducting the hearing, the Discipline Committee has power to administer an oath for the taking of testimony, may subpoena witnesses, and may cross-examine and adduce evidence in defence and reply. If the person charged is found guilty, the Executive Council may order that all the costs of the inquiry be charged to that person. On the other hand, the Executive may demand from any person requesting an inquiry, a reasonable sum as a deposit to cover necessary costs, and in the event the complaint is found to be frivolous or vexatious, the deposit may be so applied.

Any person who has been suspended or expelled from membership in the Association or who is otherwise disciplined may appeal to The Teaching Profession Appeal Board at any time within six months of the date of such disciplinary action. The appeal so made is founded on a copy of the proceedings before the Discipline Committee. The following

excerpt from the Discipline By-laws leaves no doubt as to the power of the Appeal Board:⁴¹

The Board may upon the hearing of the appeal make such order to the Executive Council as to restoration of membership or make such recommendation to the Minister as to restoration of certificate, or confirmation of the suspension or cancellation, or for further inquiries by the Discipline Committee or the Executive Council into the facts of the case, and as to costs, as shall be just.

The Alberta Teachers' Association also has a Professional Relations Commission established to deal with disputes affecting members in the practice of their profession. Its purpose is to provide a settlement of disputes between colleagues before external interference produces a grievance.

The provisions for the appointment and procedures for operating this commission are clearly outlined.⁴² The function of this commission is investigatory and/or mediating in nature and does not involve quasi-judicial procedures. In the event the dispute or complaint being investigated cannot be resolved by the commission, the commission may recommend to the executive that a charge be laid.

Saskatchewan Teachers' Federation

The Saskatchewan Teachers' Federation provisions for disciplining members are virtually the same as those obtaining in Alberta. One major difference is that concerning appeal. In contrast with the Alberta Teaching Profession Appeal Board, Saskatchewan teachers may appeal to the Minister, who, if confronted with an appeal against a Saskatchewan

⁴¹Ibid., p.213.

⁴²Ibid., pp. 254,255.

Teachers' Federation recommendation of cancellation or suspension of the certificate of qualification of a member, and if he is "of the opinion that the recommendation is unjust or contrary to the public interest," may:⁴³

- a) request the executive [of the Saskatchewan Teachers' Federation] to reconsider the case and its findings thereon;
- b) if the executive and the person whose conduct is under inquiry agree, appoint a board of arbitration consisting of one member nominated by the executive, one nominated by the person whose conduct is under inquiry and one appointed by the Lieutenant Governor-in-Council to review or rehear the case and render decision thereon. 1948, c.56, s.3.

One further Saskatchewan provision is in the nature of a privative clause. It reads:⁴⁴

No action shall lie against the Council or the Executive or the Discipline Committee, or any member thereof, for any proceedings taken or orders given or enforced under the disciplinary provisions of this Act. 1948, c.56, s.3.

The actual procedure followed by the Saskatchewan Teachers' Federation in dealing with discipline cases is quite similar to that in use in Alberta. A staff officer investigates the complaint and reports to the Executive. If a hearing is held, the staff officer who conducted the preliminary investigation is in attendance⁴⁵ along with a solicitor, but does not act as a prosecutor. The person charged may also have legal counsel, supplied by the Federation, if required.

⁴³R.S.S. 1953, c.183, s.51 (2).

⁴⁴Ibid., s.45.

⁴⁵A proposed change in the A.T.A. procedure would prohibit the attendance of the investigating officer at the hearing.

A verdict is arrived at and communicated to the Executive along with recommendations for action, if any. The Executive may order further hearing but may not alter the verdict. It may also revise the penalty recommendation. The Discipline Committee may recommend a reprimand, suspension or cancellation of certificate. The Executive may recommend the latter course to the Minister. In practice, the Minister will not deviate from the recommended action without further consultation with the Saskatchewan Teachers' Federation.⁴⁶ Many cases where complaints are laid are not considered to be sufficiently serious to warrant a hearing. In such instances an informal reprimand may be given. Again as in tenure cases, there seems to be an inclination to settle short of a formal hearing if this can be done.

Manitoba Teachers' Society

In Manitoba, disciplining procedures are somewhat less formal. The discipline committee has no subpoena powers, and the person charged is not allowed legal counsel. He may have teacher counsel. The fact that compulsory membership in the Manitoba Teachers' Society does not obtain, means that expulsion from the Society does not result in loss of teaching certificate.

The actual procedures employed in dealing with a case, while informal, are quite distinct and patterned.⁴⁷ If a complaint is

⁴⁶ Interview with Bruce Wiggins, Staff Officer, S.T.F.

⁴⁷ Interview with Emerson Arnett, General Secretary, M.T.S.

received it is referred to The Ideals and Practice Committee which conducts a preliminary investigation. If there appears to be a prima facie case it recommends to the Executive that a charge be laid.

At the hearing, the charge is conducted by the General Secretary. Witnesses may be called and heard, cross examination occurs, committee members may ask questions for clarification during the hearing. The General Secretary makes summation and recommendations to the committee, and the teacher counsel for the defense sums up for the teacher and makes such plea as he thinks desirable. The General Secretary may rebut new material presented in such a plea. The hearing is then closed and the committee meets to consider the verdict. The General Secretary does not attend this meeting. The verdict with accompanying recommendation is transmitted to the Executive which has power to question the verdict but which ordinarily accepts it. It may alter recommendations for action. While the above procedure seems to be in keeping with formal court procedures, the absence of professional legal counsel from the hearing is a cause for concern as to the judicial quality of the proceedings.

In practice, the policy of the Manitoba Teachers' Society is to rely heavily upon informal and mediating or persuasive methods of settling disputes. The persuasive power of the Society is largely of two kinds: (1) legal power of the organization--power to recommend loss of certificate, expulsion or suspension from the organization; (2) moral persuasive power--appeal to professional pride, reliance upon social pressure of peers, or upon conscience. While emphasizing the

latter, the Manitoba Teachers' Society does not completely eschew less gentle tactics. The January-February, 1964 issue of The Manitoba Teacher, official journal of the Society, carried a full page account, set within a frame of heavy black lines, and headlined "Report on Charges of Unprofessional Conduct."⁴⁸ It outlined the action taken by the Provincial Executive of the Manitoba Teachers' Society in concurring with the findings of the Judicial Committee on charges of unprofessional conduct laid against two of its members. In both cases, failure to honor a contract was the issue, and in each instance, the person was reprimanded by the Society, and a report on the proceedings forwarded to the Minister of Education. In thus publishing the findings of its Judicial Committee, the Manitoba Teachers' Society differs from most other organizations.

Ontario Teachers' Federation

The Ontario Teachers' Federation comprises five affiliates, each having its own internal arrangements for disciplining its members.⁴⁹ The procedures employed by these affiliates are substantially similar, and in the event investigation of a complaint of unprofessional conduct results in the affiliate's desiring suspension or cancellation of the

⁴⁸The Manitoba Teacher, Vol. 42 (January-February, 1964), p.36. (Published by the Manitoba Teachers' Society, Winnipeg, Manitoba.)

⁴⁹Interviews were held with the Secretaries of the Ontario Teachers' Federation and four of its affiliates. Data concerning the Association Enseignants Franco-Ontariens were obtained from its Secretary through a questionnaire.

certificate of the person against whom the complaint has been laid, such a recommendation must come before the Ontario Teachers' Federation. In the event this occurs, the case is considered by the Relations and Discipline Committee. If this committee is not satisfied with the report of the affiliate investigation it may order further investigation. When this has been attended to, a report is forwarded to the Ontario Teachers' Federation Executive. The Executive may modify the recommendation of the Relations and Discipline Committee, or it may ask for further consideration of the case. The Executive may recommend to the Minister suspension or cancellation of a certificate. If the person charged is dissatisfied with the Executive's recommendation, he may appeal to the Board of Governors of the Ontario Teachers' Federation. As is the case in Manitoba and British Columbia, the actual proceedings for investigation, most of which take place at the affiliate level, are rather informal. Regarding membership on Relations and Discipline Committees both at the affiliate and Federation level, care has been taken that duplication of function does not take place. Committee members are not members of the affiliate executive, nor of the executive of the Federation, nor of the Federation's Relations and Discipline Committee.

The Federation is also at pains to assure its members that while it will take disciplinary action if necessary, it will also take steps to defend members who have been accused unjustly, frivolously or maliciously.

Corporation Des Instituteurs et Institutrices Catholiques Du Quebec

In no teachers' organization in Canada is the policy respecting disciplining of members for unprofessional conduct more systematically and clearly laid out than in this organization of the French speaking teachers of Quebec.⁵⁰ In structure and procedure the discipline committee does not differ greatly from what obtains in other provinces. Rather more authority is vested in the staff officers of the organization and in the President of the Discipline Committee than is the case in other organizations. The latter "has complete authority and may determine, at his discretion, the procedure, and will see that the sittings of the inquiry and the hearings be carried on with dignity and good order."

A number of characteristics of the Discipline Committee and its functions distinguish them from their counterparts in other provinces.

(1) The members of the Discipline Committee are elected by the General Council of the Corporation.⁵¹

(2) Rogatory Commissions comprising the President and Secretary of the Committee, or the Executive Secretary of the Corporation, may travel to distant parts of the province to gather evidence in the event it is felt that to bring all witnesses to the hearing would constitute too great an effort or expense.⁵²

(3) The Discipline Committee may suspend the hearing of any complaint when it learns that the said case is up for trial before the Civil Court.⁵³

⁵⁰Interview with Leopold Garant, President, and Jean Lamy, Secretary, of C.I.C.

⁵¹Law, By-laws, and Code of Ethics, C.IX, Article 55. (Published by C.I.C., Quebec City, 1963.)

⁵²Ibid., Article 95.

⁵³Ibid., Article 100.

The sanctions employed by the Corporation are also unique in that they include disqualification for a specified period of time from whatever functions the guilty person might have within the Corporation, whether it be eligibility to be a member of the General Council, to be a delegate to the General Council, or other similar privileges. A member may also be suspended, excluded, or have a report with suggestions sent to the Superintendent of Education. While there is appeal to the General Council against a verdict or penalty there is no appeal to an external authority.

In addition to its code of ethics the corporation has included in its By-laws a list of acts⁵⁴ which the Corporation holds to be "derogatory to the honor and exercise of the profession." Among these the following one is particularly relevant at this point.

To enter into any pact with anyone interested in a case of an instance in expulsion so as to induce into error, or to try to induce into error the Discipline Committee, the Administration Committee or the General Councils [is a derogatory Act].

Provincial Association of Protestant Teachers of Quebec

In the event a complaint or charge is lodged against a member of the Provincial Association of Protestant Teachers of Quebec, a preliminary investigation is conducted by a Staff Officer, who, if he feels it is justified, recommends to the Executive that a hearing be held. The

⁵⁴Ibid , Article 107.

Executive, if it concurs, appoints an ad hoc Board of Discipline to conduct a hearing. Procedure is spelled out in By-law XV of the Charter.⁵⁵ Upon receiving a report and recommendations from the Board, the Executive deliberates, and upon reaching a decision concerning penalty, communicates it to the accused. The Secretary of the Association reports a strong tendency toward informal procedures with considerable latitude allowed the staff officers in preliminary investigations.⁵⁶

New Brunswick Teachers' Association

While the New Brunswick Teachers' Association's disciplinary process does not have a statutory basis, the intent of the membership is quite clear in the resolutions establishing the Professional Conduct and Standards Committee. This Committee comprises a Chairman, who is to be a member of the Executive, and four other members. This Committee's jurisdiction is to some extent different from that of its counterparts in other organizations in that it includes cases of incompetency. Provision is also made for Boards of Reference to refer cases to it. The Committee may recommend to the Executive that persons charged be exonerated, reprimanded, or have licence suspended or cancelled.

Regarding procedure, a written complaint is followed by a

⁵⁵By-laws, P.A.P.T.Charter, Handbook 1963, Article XV, p.56.

⁵⁶Interview with T.H.G.Jackson, Executive Secretary, P.A.P.T.

preliminary investigation by the Secretary Treasurer, following which the latter and the Chairman of the Committee shall "if they deem necessary" refer the case to the Committee for a hearing. In the event a hearing is decided upon the procedure is as follows:⁵⁷

Both parties shall have the right to conduct their case either personally, or by counsel, to file documents, to call witnesses, to examine and to cross-examine witnesses. All oral testimony shall be sworn and all written testimony shall be in the form of an affidavit.

The above procedure is pursuant to Regulation 24 of The New Brunswick School Act Regulations.⁵⁸

It should be pointed out that while breach of contract is included in the jurisdiction of the Committee, in practice if a breach of contract allegation is made, and the investigating officer discovers that a breach has indeed occurred, a hearing may be by-passed, and a recommendation for cancellation of certificate made by the Staff Officer direct to the Minister.⁵⁹ It follows, of course, that the breach of contract would have to be clear-cut, for such a short cut in procedure to be permitted.

Nova Scotia Teachers' Union

The Union has taken great care to see that the members of its Professional Committee will not have to act as judge and jury by

⁵⁷N.B.T.A. Handbook, 1961, p.36.

⁵⁸The New Brunswick School Act Regulations, 1963, p.22.

⁵⁹Interview with Kenneth Gilliss, Staff Officer, N.B.T.A.

providing that no member of the Provincial Executive or of any other provincial standing committee be eligible to serve on the Professional Committee.⁶⁰ Members of the Professional Committee are elected at the Annual Meeting of the Union. The fact that the preliminary investigations and the hearings are both conducted by the Professional Committee, however, does make the Committee both party and prosecutor. The accused member is entitled to counsel. If found guilty, the member may be suspended or expelled from the Union. There is no provision for appeal. A Staff Officer reports that most complaints lodged with the Union office are dealt with informally.⁶¹

Prince Edward Island Teachers' Federation

No formal procedures exist in the Federation's constitution for disciplining its members, but the matter is not left at that. The Executive constitutes an Ethics Committee, in practice, and may investigate complaints, and where appropriate it may reprimand a member.

Newfoundland Teachers' Association

The Association has non-statutory provision for discipline procedures which involve a written complaint which comes before the Executive. If the Executive finds that the complaint is made in good faith, a hearing may be held at which the person charged appears, with

⁶⁰N.S.T.U. Act, 1951, c.100 (N.S.)

⁶¹Interview with Norman Ferguson, Staff Officer, Nova Scotia Teachers' Union.

counsel, if he so desires. The Executive may reprimand a member found guilty of unprofessional conduct.

V. DOMESTIC TRIBUNALS IN ACTION

While the foregoing indicates the provisions made for formally disciplining members of teacher organizations in Canada, some reference to prevailing practice, both in terms of volume of complaints, charges and hearings, and regarding any trends that may exist with respect to the manner in which disciplinary problems are dealt with, is in order. While formal records kept are in some instances rather sketchy, the data in Table VII give some indication of prevailing practices and trends.⁶²

It would appear from Table VII that in the school year 1962-63 at least, there was a tendency for complaints to be dealt with informally. Staff Officers indicated that this picture did not differ essentially from that of previous years. Of those cases which came before a tribunal, almost all resulted in a verdict of guilty, with the exception of Alberta, where of nine cases, six resulted in a verdict of guilty and three not guilty. Inasmuch as no penalty more serious than an unofficial reprimand can be handed out without a formal hearing having been held, there seems little prima facie evidence that informal proceedings are

⁶²The information contained in this table was obtained in interviews with staff officers of all the organizations listed. In some instances, the number of complaints listed is approximate. In the case of actual hearings held, the figures are accurate. This is also true of penalties assessed.

TABLE VII

RECORD OF DISCIPLINARY PROCEEDINGS IN THE SCHOOL YEAR 1962-63

| Organization | Number of Complaints in 1962 | Number of Complaints Settled Without a Hearing | Number of Hearings | Penalties |
|--------------|---|--|--------------------|--|
| B.C.T.F. | 12 | 8 | 4 | 2 reprimands 1 suspension 1 expulsion |
| A.T.A. | 20 | 5* | 9 | 4 suspensions 2 reprimands |
| S.T.F. | N o f i g u r e s g i v e n | | | |
| M.T.S. | 4 | 4 | | |
| O.T.F. | Not Recorded | | 27 | 10 certificates cancelled 14 certificates suspended 3 lesser penalties |
| C.I.C. | Not Recorded | | 2 | 2 reprimands |
| P.A.P.T. | 4 | 3 | 1 | Recommended to Department of Education that certificate be cancelled |
| N.B.T.A. | 2 | 2 | | Recommended to Minister that certificates be cancelled |
| N.S.T.U. | 1 | 1 | | |
| P.E.I.T.F. | N o c a s e s r e p o r t e d | | | |
| N.T.A. | No formal proceedings. Complaints handled informally. | | | |

*On occasion a member whose conduct is complained of may leave the Association or the province.

resulting in unfair or harsh treatment of members. This, plus the fact that in most organizations a formal charge may be insisted upon by a member, a local, or an outsider, would seem to indicate that the discipline tribunals are functioning with a fair measure of success.

Table VII reveals also that discipline proceedings are more vigorous in some regions of Canada than in others. On a regional basis, there were thirteen formal hearings in Western Canada out of a teacher population of roughly forty-five thousand, in Central Canada thirty hearings in a population of roughly one hundred thousand, and in the Atlantic Provinces, no formal hearings with a teacher population of roughly twenty thousand.

Before turning to judicial review of formal findings, material contained in the Report of the Ontario Teachers' Federation Relations and Discipline Committee to a Board of Governors Annual Meeting merits inclusion.⁶³ Of the twenty-seven cases reported upon, twelve dealt with breach of contract, seven with proven inefficiency and unsatisfactory conduct, four with immoral conduct, two with conduct unbecoming to a teacher (supplying liquor to minors) and two with emotional disturbances and mental disability.

Cases of special interest. An interesting case is reported by the Alberta Teachers' Association.⁶⁴ A teacher had been brought to court

⁶³Report of the Relations and Discipline Committee, Ontario Teachers' Federation, August, 1963. (Mimeographed.)

⁶⁴Interview with Roy Eyres, Staff Officer, A.T.A.

on a morals case which was dismissed because of lack of sufficient evidence. A local of the association then laid a charge against the teacher, a hearing was held, the accused found guilty, and expelled from the Association. One normally sees the role of the court as one of review of judicial action by a tribunal. The fact that a discipline committee was able to secure a conviction in the face of the court's failure to do so, would seem to constitute something of a double reversal of role. It also constitutes a sobering example of the power which an organizational tribunal can bring to bear upon wayward members.

In Quebec a hearing was held for a teacher who had attacked the Corporation (La Corporation des Instituteurs et Institutrices Catholiques du Quebec) in the press. The member was given an official reprimand.⁶⁵

VI. JUDICIAL REVIEW OF TRIBUNAL FINDINGS

Before leaving the subject of domestic tribunals some further reference must be made to the role of the courts in the review of the findings of such tribunals.

As indicated earlier in the chapter,⁶⁶ the Franks Committee favored recourse to a Court of Appeal in the event a party was dissatisfied with the findings of the tribunal. It was the opinion of the Committee, however, that the review should be upon points of law only, and not upon the facts of the case. In a chapter dealing with the

⁶⁵ Interview with Leopold Garant, President, C.I.C.

⁶⁶ Supra, p.201.

Courts and Domestic Tribunals, W.A. Robson lists the points of law upon which a court may rule in such an appeal case. These points are:

1. The court will insist that the tribunal will have afforded the person charged a measure of 'Natural Justice', i.e. due notice, and especially the maxim audi alteram partem.⁶⁷

2. The court will determine whether or not the tribunal has exceeded its jurisdiction.⁶⁸

3. The court will be most anxious to assure that members of adjudicating bodies be free of any bias or partiality. (Nemo iudex in causa sua.)⁶⁹

Cases. The following excerpts from the works of legal authorities shed light upon the court's role in the review of judicial action.

If it is permissible to contract out of the rules of 'natural justice', the court will not be satisfied with anything less than an express stipulation in clear terms to this effect.⁷⁰

Where the body exercising the disciplinary powers is constituted by statute, or its powers are derived from or controlled by statute, the aggrieved member may apply to the Divisional Court for an order of certiorari to quash the decision. (cf. General Medical Council v. Spackman.)⁷¹

⁶⁷W.A. Robson, Justice and Administrative Law, 3rd edition (London: Stevens & Sons, 1951), p.326.

⁶⁸Ibid., p.332.

⁶⁹Ibid., p.333.

⁷⁰Dennis Lloyd, "Disciplinary Powers of Professional Bodies," Modern Law Review, Vol.13, (July, 1950) p.303.

⁷¹Ibid., p.304.

It still remains true that the common law rules make no provision for anything in the nature of a rehearing of a decision of a domestic tribunal.⁷²

And finally this comment by Chafee:

It is, I think, now established that the courts will intervene if the domestic tribunal has acted upon a wrong interpretation or construction of its rules . . . It still remains for the tribunal to decide the facts.⁷³

While cases arising out of hearings of domestic tribunal appeals are not large in numbers, a few bear out the views expressed above.

In Cooper v. Wilson⁷⁴ a constable had been dismissed by a municipal Watch Committee and appealed the decision on the grounds that the principle of 'natural justice' had been violated owing to the presence during the Watch Committee deliberations of the Chief Constable, from whose sentence the appeal to the Watch Committee was taken. The court upheld the constable's appeal on the grounds that the hearing could not have been an impartial one under the circumstances.

A comment in Corpus Juris Secundum on the disciplining of association members is relevant:⁷⁵

The tribunal before whom the hearing or trial is held must be an impartial one (N.Y. Grassi Bros. v. O'Rourke, 153 N.Y.S. 493, 89 Misc. 234) but the fact that the members who started the investigation participate in rendering the decision does not invalidate the expulsion, where no bad faith is shown.

⁷²Ibid.

⁷³Zechariah Chafee, "Internal Affairs of Associations," Harvard Law Review, Vol. 43, #7, 1930, p.330.

⁷⁴[1937] 2 K.B., 309.

⁷⁵Corpus Juris Secundum, Vol. 7, p.63.

A Quebec case bears on the question of jurisdiction. In L'Alliance des Professeurs Catholiques de Montreal v. Labor Relations Board,⁷⁶ the action concerned the cancellation of L'Alliance's certificate of representation by the Labor Relations Board. The Board had taken this action ex parte and without notice to the teachers, who had violated the Public Services Disputes Act, R.S.Q. 1941, c.169, by calling a strike. A writ of prohibition was sought by the teachers for a declaration of nullity on the Board's action, on the grounds that they had not been given a hearing before the Board acted. The application for prohibition was granted by the Superior Court of Quebec, rejected by the Court of Appeals, and finally sustained by the Supreme Court of Canada, which held: Rinfret, C.J.

The appeal should be allowed; the respondent acted without jurisdiction and the revocation of the appellant's certificate of representation was null and of no effect. . . . An express declaration from the legislator is required to prevent the application of the principle that no person can be condemned or deprived of his rights without being heard.

Although an administrative body, the [Labor Relations] Board in making decisions of a judicial nature, as it did here, was bound by the maxim audi alteram partem. Per Rand, J.

While the courts will insist on retaining their powers of reviewing judicial action, where discretionary powers have been granted to tribunals, they will not interfere. As de Smith points out,⁷⁷

Courts have repeatedly affirmed their incapacity to substitute

⁷⁶[1953] 2 S.C.R., 140.

⁷⁷de Smith, op.cit., p.167.

their own discretion for that of an authority in which discretion has been confided.

He cites *Roberts v. Hopwood*⁷⁸ to support this statement.

There are many matters, which the Courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another.

One final case, *Board of Trustees v. Owens*,⁷⁹ is of considerable significance in the entire matter of the relationship between a code of ethics and members of the profession which adopts it, and also in the matter of disciplining those members who allegedly have violated the code.

Owens, a junior college teacher in Southern California, attracted the attention not only of his employers, but also of the California Teachers' Association of which he was an active member, when he wrote a series of letters to the local press, rather severely criticising the weaknesses of the local school system. Representing the local teachers' association he had presented to the Board, and so to the public, the results of a fourteen month study of the system. The Board did not take kindly to this action, and inasmuch as he was then in his third and final year of probation before acquiring tenure, he was informed by the Board that he would not be re-engaged for the following year, 1956-57. The teachers rallied to his defense and the Board backed down and rehired him. The matter did not end there, however. He wrote the letters noted above, and also participated in a series of public affairs

⁷⁸[1925] A.C. 578 at 606-607, per Lord Sumner.

⁷⁹23 Cal. Rptr. 710.

forums centering on the subject "Education in Lassen County." At these forums, and in subsequent letters to the press, he continued to attack the school system. He was warned by the ethics commission that he was breaching the California Teachers' Association Code of Ethics, specifically the section stating that the professional teacher "conducts school affairs through the established channels of the school system." In May of 1959 he was served notice that the Board intended to dismiss him at the end of thirty days with four charges being listed against him: unprofessional conduct, dishonesty, evident unfitness to teach, and persistent violation of the law. Before the case came up, a panel from the Personnel Standards Commission of the California Teachers' Association conducted its own inquiry, finding that Owens had violated several portions of the California Teachers' Association Code of Ethics, and was therefore guilty of "unprofessional conduct." With the trial pending, Owens was assigned 'busy work' in the Board office. The court's finding was that Owens was indeed guilty of unprofessional conduct but Wylie, J., did not rule on the charges of dishonesty or evident unfitness to teach.

At this point the North California branch of the American Civil Liberties Union entered the picture, urging that the case be re-opened on free speech grounds. The appeal was launched, and ultimately a judgment was handed down reversing the findings of the lower court.

District Court of Appeal, Peck, P.J., held that

. . . the action of the teacher in writing letters published in newspapers did not constitute "unprofessional conduct" where there is no disruption or impairment of the teaching process as

a result of the letters; the teacher violated no board or school policy by publicly airing his grievances, was not guilty of disobedience or insubordination, and such letters merely advocated, among other things, public debate on vital issues.

The learned judge went on to comment upon the term "unprofessional", saying that basically the word "unprofessional" is a relative expression without technical meaning, and that the phrase "unprofessional conduct" as used in the Education Code (California Teachers' Association Code of Ethics) has been given no legislative definition.

In concluding thus, the judge was in effect ruling against the admissibility of code of ethics provisions as constituting definitions of professional or unprofessional conduct.

The judge's further comments are pertinent:

In the judicial determination of whether the precise facts presented constitute "unprofessional conduct", the trial courts enjoy a great deal of discretion . . .

Thus the trial court's primary inquiry in the present case where the sole basis of the charges were the letters critical of education should have been to the question of whether there had been any disruption or impairment of discipline or the teaching process as a result of the defendant's letters. . . .

Instead, the trial proceedings and findings comprise a meticulous attempt to establish that the defendant's statements in the letters often ended up weighing its opinion against that expressed by the defendant in his letters . . .

It was not the court's function to debate the subject of proper administration of the school system . . . Within the limits previously discussed [impairment of teaching process, disruption of discipline, etc.] the defendant had the constitutional right to differ with the court and the administrators over what is proper management, at least in a responsible manner.

Schottky, J., dissented, stating:

In view of the foregoing it is my conclusion that the finding of the trial court that the appellant was guilty of "unprofessional conduct" is supported by the evidence, the law, and sound public policy.

The application for a hearing before the Supreme Court of California was denied, again on a majority vote of the bench, with two justices dissenting.

This case, although decided only recently, is the subject of a great deal of controversy in the education profession in the United States. Supporters of Owens claim that the implications flowing from it are four fold:⁸⁰ (1) that the California Teachers' Association Code of Ethics (and, presumably, any other code) has no legal standing in cases involving questions of unprofessional conduct; (2) that the California Teachers' Association's expert witness law is not as strong as its proponents had hoped; (3) that barring disruption or impairment of discipline or of the teaching process the term [unprofessional conduct] may not be applied to public criticism by teachers, of the educational system of which they are a part; and (4) that teachers have been granted the protection of the First Amendment⁸¹ in circumstances where they had previously been completely vulnerable.

A representative of the California Teachers' Association is not prepared to go so far. He writes:⁸²

We can agree that the Appellate Court decision indicates that the C.T.A. code, and even the new national Code of Ethics of the Teaching Profession are not admissible in court as legal definitions of professional conduct.

⁸⁰Charles Tyner, "Neglected Landmark: California's Jack Owens Case," Phi Delta Kappan, Vol. XLV, Number 6, 1964, pp. 270-277.

⁸¹The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press . . . " Enacted December 15, 1791.

⁸²James M. Williamson, "California's Jack Owens Case," Phi Delta Kappan, Vol. XLV, Number 7, 1964, pp. 339-341.

It would seem from the majority decision of the district appeal court, that the label "unprofessional conduct" as applied to criticism of the educational system, in the public press, by a teacher cannot be valid simply because the letters have been written, and because the code of ethics stipulates that criticism of this nature must flow through proper educational channels. Rather, the consequences of such criticism must be inquired into, to determine if any impairment of the teaching process has occurred. That is to say, if those laying the charge of "unprofessional conduct" hope to succeed, they should argue, not that the accused has violated a code of ethics and is therefore guilty of "unprofessional conduct"; but that the accused, through conduct which as measured against a code of ethics is labelled "unprofessional", has impaired or disrupted the teaching and disciplinary process in the system in which he works. Furthermore it would seem essential that evidence be submitted to prove that disruption or impairment did occur.

Just how such a case would fare in a Canadian court is open to question. Some of the codes of ethics are by-laws of acts passed by the legislature and as such would have greater status in the eyes of the court than if they were only the emanations of a professional organization. It is possible also that because of firmly established domestic tribunals, the courts would be concerned more with jurisdiction and considerations of "natural justice" than with the facts presented. Nevertheless the judgment of the Owens case was a majority one only, and the cogency of the dissenting judgment was such as to constitute a reminder to teachers that faulty presentation of the case by the defendant board may have had

as much to do with loss of the case as did the facts of the case themselves.

Not by any stretch of the imagination can this judgment be considered anything in the nature of a Magna Charta or a Bill of Rights for teachers.

VII. SUMMARY

All of the teacher organizations in Canada have adopted codes of ethics. These codes are intended to constitute a guide to professional conduct for the membership. In some of the codes there are clauses which are prescriptive in nature, a breach of which could bring a member before a tribunal established by the organization to deal with unprofessional conduct on the part of the membership. While such tribunals may be referred to as domestic tribunals they are not purely so, inasmuch as (1) they are for the most part sanctioned by statute, (2) they have jurisdiction over matters in which the public has a direct interest. While these tribunals have no final authority of their own, the reliance which organization executives place on their proceedings and recommendations is such as to render them instruments of great influence and, indirectly, of great power. The fact that upon their recommendations, action may ensue resulting in decertification of members and consequent loss of means of livelihood, attests to the scope of that influence and power.

In establishing domestic tribunals and their rules of procedure, careful thought should be given to their composition, procedure, both

prior to, and during meetings, and provision for appeal from their findings. With regard to composition, every effort should be made to assure maximum independence from the administrative structure of the organization, consistent with the autonomy of the profession. Regarding procedure, care should be taken to see that those involved in preliminary investigation of complaints of professional misconduct not be participants in the conduct of hearings which ensue from such investigations. As for the hearings themselves, procedure, while not necessarily patterned after that of the courts in every respect, should be such as to assure the accused a measure of "natural justice", including due notice of the time and place of the hearing, a statement of the charge, and an opportunity to be heard on the basis of the maxim audi alteram partem. The tribunal should have the power to subpoena witnesses and administer an oath, and unless specifically prohibited by statute, the accused should have the right to counsel if he requests it.

There should be some provision for appeal against the findings of a domestic tribunal. Authorities are not in complete agreement as to the nature of such provisions. There is some support for appeal to a further tribunal, provided such a tribunal is of higher competence, e.g. one presided over by a judge, such a tribunal to rule on fact as well as law. Others favor direct appeal to the Court where only points of law could be considered. Appeal to a Minister is not generally favored.

Legislative and other provisions for disciplining teachers in Canada are a patchwork, varying widely as to composition of the tribunal, powers exercised, and procedures adopted. The extent of the variation

is not justifiable in terms of varying needs and conditions from province to province and steps should be taken to bring about greater uniformity of form, practice, and procedure. More comments on this matter appear in the concluding pages of this study.

As was the case with Boards of Reference, there is a tendency for teacher organizations to seek informal procedures for settling complaints. This tendency, however, is not so marked as in the case of tenure disputes. Roughly forty-five formal discipline committee hearings were held by teacher organizations in Canada in the 1962-63 school year, whereas in most organizations outside the Province of Quebec, only one or two or perhaps no formal Board of Reference hearings at all were held during the same period. Moreover, there would seem to be less danger of infringing the rights of the individual member through informal settlement of a complaint concerning alleged unprofessional conduct. If the investigator acts as mediator, an informal settlement cannot result in suspension or loss of membership or of certificate. This can occur only after a hearing has taken place. On a tenure matter, however, it would be possible for a teacher to be persuaded or influenced into resigning from his position, or on the other hand, a school board's retaining an incompetent, without the matter's having been the subject of a proper hearing.

Few cases arising out of unprofessional conduct on the part of teachers come before the courts. It would seem that the development of the domestic tribunal has removed from the courts the great volume of cases which otherwise they would have had to handle. This is not to

say that the courts no longer have a part to play. It means only that jurisdiction has been delegated, with the courts retaining the power of setting aside decisions of tribunals on grounds of failure to afford a fair hearing, of exceeding jurisdiction or other point of law. The findings in Board of Trustees v. Owens constitute a sharp reminder that regardless of the machinery established to dispense justice outside the courts, regardless of privative clauses, and regardless of any agreement of parties to oust jurisdiction, the courts of the land continue to stand as a final source of appeal for those who feel that justice has not been done.

CHAPTER VIII

THE LEGAL STATUS OF THE TEACHER

REGARDING PUPILS

I. INTRODUCTION

It should come as no surprise to discover that of the manifold relationships between teacher and pupil, some are legal in nature or have legal overtones. In carrying on his daily work of teaching, the instructor is doing what the law says he must do, namely "to teach diligently and faithfully all the subjects required to be taught by the regulations of the department."¹ The concern of the present chapter, however, is not with the full scope of these teacher-pupil relationships, but with a selected few which in the past have generated problems peculiarly legal in nature and which have had to be submitted to the courts of the land for interpretation and adjudication.

Previous topics have involved statutes and tribunals set up to give force to the statutes, while the present concern is more with the common law as established by precedent. This is not to say that statutes do not have a bearing or that they are not to be considered.

In this chapter consideration is given to teacher-pupil relationships which arise out of the position of special responsibility which the teacher holds in relation to his pupils. The teacher has, in many

¹The School Act, R.S.S. 1953, c.169, s.225 (1).

respects, an intermediate position between school board and pupil, inasmuch as a master-servant relationship exists between school board and teacher, and the "careful father" relationship between teacher and pupil. Both these relationships are essentially of a common law nature.

Because of the "careful father" relationship, teachers may be called to account for alleged neglect of duties and responsibilities arising therefrom. On the other hand, the master-servant relationship with the school board tends to mitigate the liability of the teacher arising from the former condition. The task of the student of school law is to determine the nature of these two relationships and to assess the legal consequences that ensue when either or both are dislocated. The major legal concept of concern here is that of negligence, and of possible liability arising therefrom. If a school pupil sustains an injury during school hours, it is always possible that negligence on the part of the school board, the administrator or the teacher, was a contributing factor. The only agency which exists for determining this, and resulting liability, if any, is the court. Inasmuch as this aspect of the teacher's legal status has been examined by others, no attempt is made here to treat the matter exhaustively. Rather the intention is to comment briefly on the legal concepts involved in the matter of negligence, and of liability for compensation, in the event negligence can be proven. The findings of Lamb and Barger are included in summary form along with reference to particularly significant cases which they have brought to light.

The other major area to be considered under the present topic is that of the authority which a teacher holds in respect of his pupils. Of the many consequences which may flow from the exercise of this authority, the present concern is with its use to maintain discipline or control of pupil behavior, and its limitations in respect of the conduct of religious and patriotic exercises in the schools. The common law concept in loco parentis comes into play when a teacher exercises authority over pupils. Acting in the place of the parent, the teacher assumes some of the rights which a parent would ordinarily exercise if he were present. Once again much of this area has been considered by other writers, with Barger, in particular, arriving at some conclusions regarding the scope of the teacher's authority, and the legal issues involved in its exercise. And again, the question is not considered in depth here; rather comments, summaries and conclusions are offered. Where significant cases have been before the courts since these studies were published, these are offered for the further consideration of the reader.

II. TEACHER LIABILITY IN RESPECT OF PUPILS

Definitions

A number of terms and concepts appear in the literature concerning negligence, and liability ensuing therefrom. Definitions and meanings of these terms and concepts are offered prior to discussing the topic as a whole.

Negligence. "Negligence is the omission to do something which

a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or something which a prudent or reasonable man would not do."² Per Alderson, B.

The Standard of Care.

The standard required of an individual is that of the supposed conduct, under similar circumstances, of a hypothetical person, the reasonable man of ordinary prudence, who represents the community ideal of reasonable behavior. The characteristics of this imaginary person include:

- a) The physical attributes of the actor himself
- b) Normal intelligence and mental capacity
- c) Normal perception and memory and a minimum of experience and information common to all the community
- d) Such superior skill and knowledge as the actor has or holds himself out as having when he undertakes to act.

In the case of children and aged persons a special standard of mental capacity is applied based upon what it is reasonable to expect of one of the actor's age, intelligence and experience.³

Careful Father. This term has come to hold significance in liability cases as a result of a judgment handed down by Lord Esher towards the close of the nineteenth century. It reads in part:⁴

The school master was bound to take such care of his boys as a careful father would take care of his boys and there could not be a better definition of the duty of a school master. Then he was bound to take notice of the ordinary nature of young boys, their tendency to do mischievous acts and their propensity to meddle with anything that came in their way.

²Blyth v. Birmingham Waterworks Co. (1856) 11 Ex. 781 at 784. Quoted in R.F.V. Heuston, Salmond on the Law of Torts, (London: Sweet and Maxwell, Ltd., 1961), p.406.

³W.L. Prosser, Handbook of the Law of Torts, 2nd Edition (St. Paul, Minn.: West Publishing Co., 1955), p.124.

⁴Williams v. Eady, (1894) 1894 10 T.L.R. 41 at 42.

Tort.

Tort is a term applied to a miscellaneous and more or less unconnected group of civil wrongs, other than breach of contract, for which a court of law will afford a remedy in the form of an action for damages. The law of torts is concerned with the compensation of losses suffered by private individuals in their legally protected interests, through conduct of others which is regarded as socially unreasonable.⁵

General Basis of Teacher Liability⁶

The kind of liability concerned here is that which arises out of negligence; for the most part what is known in law as "ordinary negligence" i.e. the failure to use ordinary care in a situation. Negligence is based on conduct, but an action founded upon negligence cannot ensue unless certain other conditions exist. These in brief are:⁷

- (a) A legal duty to conform to a standard of conduct for the protection of others against unreasonable risks;
- (b) A failure to conform to the standard;
- (c) A reasonably close causal connection between the conduct and the resulting injury;
- (d) Actual loss or damage resulting to the interests of another.

It has already been intimated that the teacher is in a peculiar

⁵Ibid., p.1.

⁶The discussion which follows is based largely upon Lamb's study Legal Liability of School Boards and Teachers for School Accidents, Chapter IV, and Barger's The Legal Status of the Canadian Public School Pupil, Chapter VII.

⁷Prosser, op.cit., p.165.

relationship with both pupil and school board in respect of liability. The same master-servant concept which, in another context and discussed under another heading, sanctions a school board's dismissal of a teacher, comes into play in the matter of liability. In this case, the teacher may be the beneficiary. As Barga has found,⁸

It has been repeatedly held by Canadian Courts that school boards are responsible in damages for the tort of their servants acting within the scope of their authority.

Lamb points to the different position enjoyed by school boards in the United States where they are considered as emanations of the state and therefore have a substantial measure of immunity from tort action.⁹ Canadian school boards have no such immunity. They can be sued.

The Legal Position of Teachers Respecting Liability

Lamb also summarized the legal position of school boards and teachers with regard to school accidents and the duties and responsibilities owed to pupils. Those points which bear upon the teacher's responsibilities either completely or in conjunction with the school board are included here.¹⁰

⁸ Barga, op.cit., p.139.

⁹ The common-law doctrine of immunity of school boards from tort liability has since been abrogated in two states of the United States. See Moliter v. Kaneland Community District, 18 Ill. (2d) 11, 163 N.E. (2d) 89; and Spanel v. Mounds View S.D., 118 N.W. (2d) 799 (Minn.). The first breach came in Illinois in 1959, the second in Minnesota in 1963.

¹⁰ Lamb, op.cit., pp. 56-60.

- (1) Boards and teachers in Canada have no general immunity in common law from tort action.
- (2) School boards are responsible for the tortious acts of their servants if the latter act within the scope of their authority.
- (3) Teachers are liable for their own negligence in school accidents, but they have some protection through the general practice of suing the board, as master in a master and servant relationship.
- (4) School boards and teachers are not responsible for accidents that happen outside of school hours or beyond the school grounds unless it can be established that the accident occurred during a school trip or outing or that the board failed to provide a "safe place" suitable for the category of user into which the plaintiff fell, or that the board or teacher failed in their common law duty to act as a "careful father" or failed to live up to a standard which others might reasonably expect of them.
- (5) Contributory negligence on the part of a plaintiff is no longer grounds for dismissal of a suit, but results only in the sharing of damages between the plaintiff and the defendant.
- (6) The giving of first aid to accident victims by other than competent persons is to be done very cautiously.
- (7) Signed permission slips for school trips and unusual activities, although a good practice, do not eliminate the possibility of legal action arising out of accidents suffered during or as a result of these trips or activities.
- (8) Common law insists that boards and teachers owe their pupils the

same degree of care that a "careful father" would give his children.

(9) Common law also requires that boards and teachers as occupiers of property take certain precautions for the safety of the persons who use that property.

Cases. The legal position of the school board and teacher outlined above has developed in the main from cases heard by Canadian Courts. Bargaen lists the categories into which these cases have fallen. This list appears below, along with the citation of a recent unsuccessful and a successful action in each category.¹¹

(1) General accidents on school grounds during school hours:

Unsuccessful actions in this category indicate that a causal relationship must be shown to exist between the action of the defendant and the injury sustained by a plaintiff before liability for negligence will attach.¹²

Successful actions in this category indicate that teachers and/or school boards will be held liable for pupil accidents if their actions have a causal relationship to the injury, if school facilities constitute an unreasonable hazard, if supervision has been inadequate, or if they have acted negligently in the performance of their duties.¹³

¹¹Bargaen, op.cit., p.140.

¹²Dyer v. Halifax School Commissioners, (1956) 2 D.L.R. 394.

¹³Gray et al. v. McGonegal and Trustees of Leeds and Landsdowne Front Township School Area (1952) 2 D.L.R. 161 2 S.C.R. 274; 1950 4 D.L.R. 395, O.R. 512, O.W.N. 475, (1949) 4 D.L.R. 344, O.R. 749, O.W.N. 127.

(2) Accidents on school grounds but out of school hours:

Only three reported cases appear in this category, all unsuccessful. The most recent occurred in 1942.¹⁴

(3) Accidents off school grounds:

Again the few cases reported show that school authorities have no liability.¹⁵

(4) Accidents in laboratories and industrial shops:

No liability attached in cases reported.¹⁶ It should be noted, however, that in this case the decision not to attach liability was made on a point of law and not on the facts.

(5) Accidents during physical education classes:

Unsuccessful actions in this category indicate that lack of supervision alone is insufficient to support a charge of negligence. Such a lack must be shown to be the cause or "proximate cause" of the mishap.¹⁷

The only successful action in this category is worthy of special comment.¹⁸ An inter-school field day was authorized by the Vancouver

¹⁴Scofield v. P.S. Board of North York, (1942) O.W.N. 458.

¹⁵Pearson v. Vancouver Board of School Trustees, (1941) 3 W.W.R. 874, 58 B.C.R. 157.

¹⁶Ramsden v. Hamilton Board of Education (1942) 1 D.L.R. 770.

¹⁷Gard v. School Trustees of Duncan (1946) 2 D.L.R. 441, 1 W.W.R. 305, B.C.R. 323.

¹⁸Walton v. Vancouver Board of School Trustees and Thomas (1924) 2 D.L.R. 387, 34 B.C.R. 38, 2 W.W.R. 49. Discussed at some length in Barga, op.cit., p.150.

School Board with each principal being made responsible for the arrangements for the exercises. Principal Thomas arranged, among other things, for a shooting contest. One boy brought a 22-calibre rifle which was inspected by the principal, but which later backfired, causing the boy to lose an eye. An action followed against both Thomas and the Board, but the Board claimed, in defence, that Thomas had exceeded the scope of his authority, that the contest had been voluntary and permitted by the parents, and that the board itself had no authority to institute such games.

In its decision the Court held the Board liable but dismissed the charges against Thomas. The Court held (1) that the trustees had not provided for a proper system of supervision, and (2) that similar contests had been held for years and were, therefore, a de facto recognition of the power of the Board to hold such games. The charge against the principal was dismissed on the grounds that he may have been unskilful rather than negligent.

(6) Accidents in regard to excursions:

Only one Canadian case is reported, and in that instance an action against the Board was dismissed because the Court held that the teachers had acted outside the scope of their official duties and that therefore the Board was not held responsible.¹⁹ It is an interesting conjecture as to what would have happened, had the action been against the teachers

¹⁹Beauparlant et al. v. Board of Trustees of Separate School Section No. 1 of Appelby et al., (1955) 4 D.L.R. 558, O.W.N. 286.

rather than against the Board.

The foregoing would seem to indicate that the teacher, provided he exercises reasonable care in carrying out his responsibilities for the safety of his pupils, and because his master-servant relationship with the school board acts as a buffer in questions of negligence, does not have a great deal to fear from the courts in the matter of liability for school accidents. It should be emphasized, however, that if provision for supervision is made the supervision should be carried out thoroughly, whether such provision is mandatory or not. One may conclude from the cases available for examination that the Court is less favorably disposed towards malfeasance or misfeasance than toward nonfeasance.

Statutory Shields

In recent years steps have been taken in some provinces to shield teachers, administrators and school boards from liability for accidents involving school pupils.

An amendment to The School Act of Saskatchewan was passed in 1963 which provides as follows:²⁰

Where the board, the principal or the teacher approves or sponsors activities during the school hours or at other times, the teacher responsible for the conduct of the pupils shall not be liable for damage caused by pupils to property, or for personal injury suffered by pupils during such activities.

The Public Schools Act of Manitoba carries a somewhat similar provision with the rider that liability will not accrue provided

²⁰R.S.S. 1953, c.169, s.225(a). As amended in 1963.

negligence is not proven. One suspects that even without such a rider, protective clauses in the statutes would not shield a teacher or a school board from liability in the event that negligence could be established.

The Saskatchewan provision was put to the test in an action before Bence, C.J., of the Court of Queen's Bench in Regina.²² In McKay v. The Board of the Govan School District Unit #29 of Saskatchewan and Molesky, McKay, a high school student, was injured in a fall from parallel bars while being instructed in gymnastics by one of the defendants, Molesky, a physical education instructor. In his statement of claim, the plaintiff, inter alia, alleged negligence on the part of the teacher on a number of counts, e.g. failure to place sufficient protective mats in the area, failure to provide qualified safety men to guard against injuries which could be caused by a fall, moving the plaintiff after the fall before ascertaining the injury or the extent of such injury, etc.

The defendant board and Molesky applied for dismissal of the action on the grounds that the plaintiff's action was barred against Molesky by the provisions of The School Act, and in particular of s.225(a) (quoted above). Bence, C.J., dismissed the application for dismissal of the action, not on the grounds that s.225(a) was inapplicable but on the grounds that an action could be maintained against the teacher for acting outside the scope of his authority. When it was demonstrated

²² This action is not yet reported. A transcript of the proceedings was secured from the Saskatchewan Teachers' Federation.

that the teacher was acting under the authority of the board, the case was dropped, but the judge did indicate that he was prepared to rule that the teacher could not be held liable under s. 225(a) of the Act, provided the teacher met the conditions set out in that section, that is, that he was acting under the authority of the board, etc.²³

It should be noted here that the defendant teacher enjoyed full support, legal and otherwise, from his professional organization, the Saskatchewan Teachers' Federation.

III. TEACHER AUTHORITY IN RESPECT OF PUPILS

The duties of teachers are of such broad scope and diversity as to require substantial authority to carry them out. And while these duties are usually quite clearly spelled out either in legislation or regulations pursuant thereto, or in regulations of the school board, much less is said as to the authority which is needed to carry out those duties. While authority is exercised at the provincial, system, school, and classroom level, our present concern is with the latter two, and with the sources of that authority, whether they be statutory, regulatory, or common law.

Sources of Teacher Authority

Statutory and Regulatory Authority. While statutory power is vested in the school board, the board has authority to delegate such

²³This information was contained in a letter from Bruce Wiggins, Staff Officer, Saskatchewan Teachers' Federation.

power. Two clauses of the Public Schools Act of British Columbia illustrate this point.²⁴

97. The Board of each school district shall
-
- (b) determine local policy in conformity with this Act for the effective and efficient operation of the schools in the school district;
 - (c) delegate those specific and general administrative duties which require delegation to one or more than one employee of the Board.

Rules of the Council of Public Instruction, also of British Columbia, are more specific with respect to authority, and particularly with respect to disciplinary powers. Regulation 3.09 reads as follows:²⁵

The principal of a school, subject to the provisions of the Public Schools Act, is responsible for the administration and supervision of his school, including supervision over

- a) the classification of pupils;
- b) the time tables of the teachers;
- c) the exercises, methods, and general discipline pursued in all grades; and
- d) the conduct of all the pupils;

and may, in his discretion, exercise on occasion, paramount authority in discipline, and administer the same.

Regulation 3.05 concerns the authority of the teacher:

Every teacher shall practise such discipline as may be exercised by a kind, firm and judicious parent in his family, avoiding corporal punishment, except when it shall appear to him necessary. . . .

Section 63 of the Criminal Code of Canada justifies the use of force by teachers as a means of exercising authority. It states:²⁶

²⁴1958, c.42, s.97 (b) (c) (B.C.)

²⁵Rules of the Council of Public Instruction, Manual of School Law, Province of British Columbia, p.3.

²⁶A.E.Popple, Snow's Criminal Code of Canada, s.63, Sixth Ed., (Toronto: The Carswell Co. Ltd., 1955), p.47.

Every school teacher, parent, or person standing in the place of a parent is justified in using force by way of correction towards a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances.

Common Law Authority. The use of the word "reasonable" in the above clause leads the discussion in the direction of the common law which is of major influence in the matter of authority of teachers over pupils. Edwards, in discussing the matter, makes this point:²⁷

In determining whether school officers or teachers have authority to enforce a particular rule or regulation governing the conduct of pupils, the courts universally apply the test of reasonableness. It is well established by a great number of cases that school officers may enforce any rule which is reasonable and necessary to promote the best interests of the school.

He goes on to point out, however, that neither the teachers' nor the boards' powers are unlimited in this respect.²⁸

Neither school boards nor teachers, however, may enforce rules governing the conduct of pupils with respect to matters over which the board has no jurisdiction. That is, the conduct which the board undertakes to regulate must have some direct relation to the management and well being of the school.

He cited a case in which the judge made it clear that while it was within the teachers' authority to require pupils to carry wood as a punishment, they could not require it as work to be done.²⁹

Any rule or regulation which has as its object anything outside of the instruction of the pupil - the order requisite for instruction -

²⁷Newton Edwards, The Courts and the Public Schools (Chicago: University of Chicago Press, 1953), p. 564.

²⁸Ibid., p. 565.

²⁹State v. Board of Education, 63 Wis. 234, 23 N.W. 102, 53 Am. Rep. 282. Quoted in Edwards, op.cit., p. 565.

is beyond the province of the board of education to adopt. The requirement that school children should bring up wood, when not as a punishment, has nothing to do with the education of the child. It is nothing but manual labor, pure and simple, and has no relation to mental development.

A further statement by Edwards suggests the reason why it is difficult to make statutory or regulatory provision, in detail, for the exercise of the authority needed to run a school.³⁰

It is well established that a board of education may expel or suspend a pupil from school, even though the pupil may not have violated any rule whatever. School relationships are inherently such that no set of rules, however exhaustive, can cover every offense against good order and deportment. It follows therefore that school authorities may dismiss a pupil for any offense which interferes with the orderly conduct of the school or which impairs the usefulness and well-being of the school. Such is the case, regardless of the existence or non-existence of a rule covering the offense.

The judgment handed down by the Supreme Court of Wisconsin contains a statement that is particularly lucid in its exposition of the common law position which the teacher holds in exercising authority over his pupils. It has been cited with approval repeatedly.³¹

While the principal or teacher in charge of a public school is subordinate to the school board or board of education of his district or city, and must enforce rules and regulations adopted by the board for the government of the school, and execute all lawful orders in that behalf, he does not derive all his power and authority in the school and over his pupils from the affirmative action of the board. He stands for the time being in loco parentis to his pupils, and because of that relation he must necessarily exercise authority over them in many things concerning which the board may have remained silent. In the school as well as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment,

³⁰ Edwards, op.cit., p.602.

³¹ State v. Burton, 45 Wis. 150, 30 Am.Rep. 706.

respect for the rights of other pupils and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know the law and is subject to it, whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly.

One might conclude from the above references that while general principles may be enunciated with respect to the exercise of authority, specific provision for such exercise is virtually impossible. It is quite likely that disputes arising out of the exercise of the teacher's authority will continue to come before the courts and that the decisions arrived at will be on the basis of the facts presented in each instance. The number of such disputes may be reduced to a minimum only if teachers, pupils, and parents become more aware of the responsibilities that fall upon each in carrying on the cooperative process which is the school.

Authority of Teachers to Discipline Pupils

Having considered the general basis upon which the teacher's authority rests, we now turn to an examination of rather particular applications of that authority. In so doing we shall be concerned mainly with the disciplining of pupils.

Disciplining of pupils. It is a commonplace that if effective work in a school is to be carried on, a measure of good order and discipline must be maintained. The law specifies that it shall be the responsibility of the principal and his staff that such order be maintained. There are many means by which this may be done. These

may be of a persuasive nature, they may arise out of a philosophy of permissiveness, or they may rest upon the formal authority to correct or punish which is vested both by statutory and common law in the principal and his staff. With regard to corrective or punitive powers we are concerned especially with the power to inflict corporal punishment upon pupils, and the power to suspend pupils from attending school at all. Once again, because of the common law origin of present disciplinary practice, the role of the courts in controlling such practice continues to be significant.

Bargen points to three questions which the Courts must ask themselves in dealing with discipline and control of pupils. They are:³²

1) Was the teacher acting within the scope of his legal authority? This question involves the statutory authority of the teacher as well as his authority in loco parentis.

2) Was there cause for punishment? In answering this question the Courts have indicated their reluctance to set aside a teacher's judgment.

3) Was the punishment reasonable under the circumstances? This question generally constitutes the heart of any litigation and must be answered on the basis of precedent and common law.

Bargen says:³³

The first of the above questions is a question of law; the last two are questions of fact. The question of law, once validated, cannot be further doubted. The questions of fact are different in each case and, therefore, become the prime concern of the Courts in any litigation.

³²Bargen, op.cit., p. 117.

³³Ibid.

Corporal punishment. Of all the types of punishment employed by teachers in the disciplining of pupils, the one most likely to lead to court action is corporal punishment. The right of the teacher to employ it is firmly rooted in precedent as well as in the law of the land. In general, the function of the Court in dealing with such an action is to try to determine whether the punishment was reasonable or excessive. Once again the decision has depended and will depend upon the facts and the circumstances surrounding the facts. The use of a heavy strap on a young girl was regarded as excessive, even though inflicted upon the hands,³⁴ while the beating of a strong fourteen year old boy on the shoulders and the backs of the hands with a hardwood ruler, and by a female teacher, was ruled reasonable by the court.³⁵

These and numerous other cases from British, American, and Canadian sources all point to the same general conclusions. The teacher has the right to inflict corporal punishment, provided it is done according to the rules and in keeping with reason and common sense. An American judge has summed up the position in this fashion:³⁶

The line which separates moderate correction from immoderate punishment can only be ascertained by reference to general principles. The welfare of the child is the main purpose for which pain is permitted to be inflicted. Any punishment, therefore, which may seriously endanger life, limbs, or health, or shall disfigure the child, or cause any other permanent injury, may be pronounced immoderate, as not only being unnecessary for, but inconsistent with the purpose for which correction is authorized. But any correction, however severe, which produces temporary pain and no permanent ill, cannot be so pronounced,

³⁴Andrews v. Hopkins, 5 M.P.R. 7, [1932] 3 D.L.R. 459 (N.S.C.A.) [Abridged Vol. 18 col. 1143.]

³⁵R.V. Zinck (1910) 8 E.L.R. 178, 18 C.C.C., 456, N.S.

³⁶State v. Pendergrass, 2 Dev. & B., (N.Car.) 365, 31 Am. Dec.

since it may have been necessary for the reformation of the child, and does not injuriously affect his future welfare.

While the position taken by a Canadian justice offers the teacher rather less latitude, in essence he agrees with his American colleague.³⁷

Per Chipman Co.Ct.J.: Teachers imposing corporal punishment should be careful to bring themselves strictly within the rules of law so clearly and forcibly laid down in the cases referred to, and not to punish wilfully, maliciously, capriciously or too severely. Each case must be decided according to the facts submitted; and it must always be borne in mind that it is a question of fact for determination, whether in the case at bar the punishment has or has not been excessive. Herein the difficulty lies, and the teacher who acts firmly, but kindly and mercifully, and inflicts punishment in moderation will, in most instances, and should in all, escape an investigation of his conduct in the courts.

While the cases referred to above involve actions against teachers, it must be remembered that the master-servant relationship comes into play in instances where liability is involved. Two cases, referred to by Bagen, support this position. In Murdock v. Richard et al., an action brought against a teacher for alleged excessive punishment, the judge stated:³⁸

If the teacher . . . is liable, the Board of School Commissioners is liable as well.

In Duchesne v. Montreal Catholic School Commission, the commission was held responsible for damages "caused by an unjustifiable assault upon,

416. Quoted in R.v.Metcalf [1927] 3 W.W.R. 194, 49 C.C.C., 260 Sask.

³⁷Regina v. Robinson (1899) 7 C.C.C. 52 (N.S.)

³⁸[1954] 1 D.L.R., 766 (N.S.) Quoted in Bagen, op.cit., p. 133.

and maltreatment of, a pupil by one of the teachers."³⁹

Suspension. The alternative to corporal punishment to which teachers have sometimes turned, when confronted with serious discipline cases, is suspension or expulsion of the offender from school. The authority for this is contained in the provincial statutes. The Alberta School Act's provision gives broad powers to the teacher and principal.⁴⁰

369(1) Where a pupil is guilty of open opposition to authority, wilful disobedience, habitual neglect of duty, the use of improper or profane language, or of other conduct injurious to the moral tone of the school,

- a) a teacher may suspend the pupil from class, and
- b) the principal may suspend the pupil from school or from riding on the school bus, or both.

(2) The teacher shall report any suspension immediately to the principal if in a graded school.

(3) The principal of the school, or the teacher in the event of there being no principal, shall

- a) prepare forthwith a written report of the suspension setting out all the circumstances, and
- b) send the report
 - (i) to the board by which the teacher is employed;
 - (ii) to the superintendent, if any;
 - (iii) to the parent or guardian of the pupil.

(4) The board may take such action as it deems necessary with regard thereto.

This leaves no doubt as to the basic right of teacher and principal to take action to suspend but not to expel a pupil. The function

³⁹(1923) 61 Que. S.C. 442. Quoted in Bargaen, op.cit., p. 133.

⁴⁰R.S.A. 1955, c.297.

of the Court is to determine whether such action is reasonable under the circumstances, and/or whether the teacher has acted with malice or caprice.

Some of the principles deduced by Bargaen in considering the legal position of the pupil appear equally applicable in a discussion of the legal status of the teacher. These principles are presented here along with citation of leading Canadian cases:⁴¹

1. Teachers have power to suspend, and school boards have power to expel a pupil for just and reasonable cause.⁴²
2. A valid reason for suspension or expulsion is any offence that interferes with the efficient operation and purposes of the school.⁴³
3. Malice must be proven, not only implied, before a court will use it as grounds for interfering with a reasonable decision of a teacher or board in matters of suspension or expulsion.⁴⁴
4. A teacher cannot be compelled by a board of trustees to suspend or expel a pupil unless the teacher himself has a reasonable complaint against the pupil.⁴⁵

⁴¹Bargaen, op.cit., p. 124.

⁴²This power derives from the statutes.

⁴³Re Minister of Education and McIntyre v. Blanchard P.S. Trustees, (1886) 11 O.R. 439 (C.A.)

⁴⁴Ibid.

⁴⁵LeClerc v. Perigord School District (No. 2) (1925) 2 W.W.R. 312, 19 Sask. L.R. 435, 3 D.L.R.

Religious and Patriotic Exercises

While a number of cases concerning the place of religious and patriotic exercises have come before Canadian Courts, these have generally involved pupils and their parents, on the one hand, and school boards and public policy on the other. The only exception to this appears to be one concerning whether or not the wearing of religious garb by a teacher is to be considered as religious denominational teaching. In only one case, in New Brunswick in 1896 did this matter come up for interpretation.⁴⁶ In Rogers v. Bathurst School Trustees, the judge rejected the claim that Roman Catholic Sisters of Charity, by virtue of wearing the garb of their order, were in fact "inculcating sectarian doctrines and tenets."

While religious cases have so far not usually involved teachers, there is no assurance that this will continue to be so. At its last annual meeting, the British Columbia Teachers' Federation passed a resolution registering its opposition to requiring teachers to conduct religious exercises in the schools of British Columbia. On the strength of such a development, one might conjecture that litigation concerning the issue may arise in the near future.

IV. SUMMARY

Statutes, regulations, and the common law place the teacher in a "careful father" relationship with his pupils. Such a relationship

⁴⁶(1896) 1 N.B. Eq. 266.

involves responsibility for care and supervision. Because this responsibility exists, the possibility of it not being properly shouldered also exists. In the latter event, the teacher may be called to account for negligence, and if negligence is proven, he may well face liability for such neglect.

It must be recalled, however, that the teacher has another significant legal relationship, that of master and servant with his employer, the school board. Because of this relationship, liability occasioned by negligence tends to devolve upon the school board, especially if the teacher in incurring such liability is acting within the scope of his duties.

Case law indicates that while a teacher may be liable for proven neglect of duty, in the main, the teacher who exercises reasonable care in supervising the activities of his students will find the courts disposed to exonerate him.

With regard to discipline, the concept of in loco parentis has given the teacher authority beyond that derived from the statutes. It permits the teacher the kind of latitude which a parent might expect to have in the disciplining of his child if he were present. In sending his child to school, the parent is in effect delegating some of his authority to the teacher.

In the pupil-teacher relationship, responsibility devolves upon the student to obey lawful commands, and generally to be civil in his deportment. The obligation to do so has been said to constitute the common law of the school.

The common law position in respect to discipline is supported by a provision of the Criminal Code which authorizes the use of corporal punishment upon recalcitrant pupils. The courts have held that such punishment must be "reasonable under the circumstances," and that it must not have had its source in malice or caprice. The statutes also provide for suspension of pupils by the teacher for behavior which militates against the efficient operation and purposes of the school.

As in the case of liability, it appears that if the teacher behaves reasonably and without malice in maintaining pupil control, he will find the courts disposed to support him so long as he acts within the scope of his authority.⁴⁷

⁴⁷For a discussion of teacher liability for accidents involving school pupils off the school grounds see Bargaen, op.cit., p.147.

CHAPTER IX

THE LEGAL STATUS OF THE TEACHER REGARDING ACADEMIC FREEDOM AND CIVIL RIGHTS

I. INTRODUCTION

In discussing this topic it is necessary first to distinguish between academic freedom and civil rights, and secondly to discover whether or not any differences exist between teachers and other citizens in the enjoyment of civil and political rights.

One approaches a discussion of academic freedom with some trepidation in the light of Sidney Hood's statement in his book Heresy Yes, Conspiracy No. Speaking of academic freedom, he said:¹

More sloppy rehtoric has been poured out per page, both by those who believe they are supporting it, and those intent on criticising it, than on any other theme, with the possible exception of democracy.

II. ACADEMIC FREEDOM

The public conception of the term "academic freedom" appears to be vague. There is a tendency to regard any issue on a university campus which results in the dismissal of a professor as an issue involving a breach of academic freedom. Thus, if a professor seeks to hold a public office and pressure is brought to bear upon him not to do so, there are charges of a breach of academic freedom. If a professor

¹Quoted in Frank H. Underhill, "Academic Freedom in Canada," The C.A.U.T. Bulletin, Vol. 8, No. 2, (December 1959), p. 7.

is charged with immorality or other misdemeanor, with taking sides in a public issue, or with criticising the administration of his own university, and any punitive measures are taken, again talk of the sacredness of academic freedom arises.

There seems little tendency on the part of the public to associate questions of academic freedom with the elementary and secondary school teacher. Even the teachers themselves do not press the point. Policy statements of teacher organizations tend to be silent on the issue. So are the provincial statutes. The term does not appear in the school or department of education acts. Neither is there reference to it in departmental or school board regulations which have come to hand.

In the absence of definitions of the term, given by teacher organizations, the following statements on academic freedom (two of which come from associations of University teachers) are submitted, in order that some light may be shed on the matter.

The first of these reads as follows:²

Institutions of higher education are conducted for the common good and not to further the interest either of the individual teacher or the institution as a whole. . . . The common good depends upon the free search for truth and its free expression. Academic freedom is essential to these purposes and applies both to teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching, and of the student to freedom in learning. It carries with it duties correlative with rights.

The statement continues, in part:

²From the Bulletin of the A.A.U.P., Vol. 43, No. 1, Spring, 1957. Quoted in The C.A.U.T. Bulletin, Vol. 6, No. 9, April, 1958, pp. 28,29.

The teacher is entitled to freedom in the classroom in discussing his subject but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject . . .

The college or university teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen he should be free from institutional censorship or discipline, but his special position in the community imposes special obligations. As a man of learning and an educational officer, he should remember that the public may judge his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinion of others, and should make every effort to indicate that he is not an institutional spokesman.

The statement of the Canadian Association of University Teachers is much briefer but says some of the same things. It reads:³

Institutions of higher education are conducted for the common good, and the common good depends upon the free search for truth and its free exposition. Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in teaching and in research is fundamental to the advancement and dissemination of truth. Academic freedom carries with it responsibilities as well as rights.

A definition by MacIver merits inclusion. He defines academic freedom as⁴

. . . a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because these conclusions are unacceptable to some constituted authority within or beyond the institution. . . . It is inherently bound up in the university's task . . . it is not a privilege, not a concession, not something that any authority inside or outside the institution can properly grant or deny, qualify or regulate according to its interests or its decisions.

This last definition would seem to be more accurate than those

³From The C.A.U.T. Bulletin, Vol. 8, No. 3, February, 1960, p.16.

⁴Robert M. MacIver, Academic Freedom in Our Time (New York: Columbia University Press, 1955), p. 6.

that precede it. The college professor is not the only professional person to work for an institution, and his right as a citizen to write and speak on public issues is no different from that of other professional persons. This right does not stem from his position in academia, but from his citizenship.

Similarly, the matter of "being careful not to introduce into his teaching controversial matter which has no relation to his subject" raises a question. Exclusion of irrelevancies is a function of good teaching and not a condition of academic freedom. The good teacher excludes irrelevant material, not because it is controversial, but because it is irrelevant. On the other hand, the teacher's right to freedom in research, and particularly to freedom in the classroom, is unique to his academic position, and any constriction or abridgment of such right is, in the most accurate sense of the term, an encroachment on academic freedom.

While the question of freedom to publicise and make known research findings if not generally relevant to classroom teachers, (and even this may not continue to be so), the question of freedom to practise his profession with integrity should be of concern to every teacher in every classroom in the country.

So far as it has been possible to ascertain, the issue of academic freedom or alleged breach thereof has not been raised in Canadian public schools. No cases have come before the courts. There has been nothing to compare with the famous Scopes trial which took place in Tennessee in

1923.⁵ This case involved the dismissal of a biology teacher for teaching Darwin's theory of evolution in violation of the statutes which specifically prohibited such teaching. The trial attracted almost world wide press coverage, focussing attention on the issue of academic freedom in dramatic fashion.

Another American case of more recent vintage, Worley v. Allen⁶ raises the issue of academic freedom. A tenure teacher, chairman of the high school English Department, was dismissed for refusing to file lesson plans two weeks in advance. He appealed to the Tenure Commission, the State Commissioner, and finally to the courts, pleading academic freedom in his defense. The courts ruled against him on the grounds

. . . that rules of management are necessary to run schools; and that teachers, even very able ones, must obey the rules of management if the schools are to run at all.

The lack of such cases in Canadian annals does not necessarily mean either that Canadian laws are less restrictive in this respect, or that Canadian teachers are more free to exercise academic freedom. Neither is the fact that academic freedom is not generally a public issue in the schools necessarily a matter for rejoicing. One is impressed with Underhill's comment on the matter:⁷ "My own personal feeling remains that the best way to defend academic freedom is to exercise it."

⁵Scopes v. State, 289 S.W. 363.

⁶212 N.Y.S. (2d) 894.

⁷Underhill, op.cit., p. 7.

While the discussion which follows may be somewhat removed from the law, it seems relevant to seek an explanation for the fact that the question of academic freedom has not been a legal issue in Canadian public schools. Is it that teachers do have full academic freedom, that they do exercise it to the full, and that there is no occasion for the law to prescribe or intervene? Or is it possible that the classroom teacher, hemmed in with curriculum guides, school board rules and regulations, influenced by supervisors, and cautioned by his code of ethics and his professional organization to complain, if he must, only through proper channels, is no longer a truly professional person? Whatever the answers may be to these questions, there seems to be no convincing argument that academic freedom is less vital to the public school teacher than to the university professor. It is in the elementary school that the child must develop the habit of free inquiry and where he must be intellectually stimulated, if the greater degree of independence which the more mature university climate offers is to bear full fruit.

If the teacher does not exercise academic freedom it is not because he is not in a legal position to do so. In many provinces, tenure legislation affords a substantial measure of protection to him to practise his profession as he sees fit. Indeed, one of the underlying reasons for advocating tenure legislation is the argument that job security contributes to professional freedom.

There are those who would say that the biggest obstacle to genuine academic freedom is the bureaucratic organization which the

requirements of mass education have imposed upon the education profession.

An A.T.A. Magazine editorial suggests this:⁸

The notion that there is an area of administrative prerogative which is none of the teachers' business is arrant nonsense. Anything which affects how teachers are able to carry on the business of teaching is very much the concern of teachers. It would be a sorry day indeed for education if teachers accepted any more control than there now is on what they are required to do and how they are required to do it. Central administration in school systems can easily become so divorced from reality that its procedures, its rituals, impede rather than facilitate teaching in the classroom.

And in The Nova Scotia Teacher, a relevant statement:⁹

The good school administrator is not a boss. He is the playing coach and captain of the team. He is first and foremost an educator, rather than a manager or administrator. His work is not over but with his staff. The whole educative process is a joint effort in which there must be mutual respect, understanding and cooperation. The group is not dealing with things but with ideas. The administrator encourages, guides and stimulates his staff toward excellence in performance and coordinates the activities of his professional peers.

And finally, from the Secretary-Treasurer of the Canadian Teachers' Federation:¹⁰

Perhaps without realizing it, we have allowed and even encouraged two directions of development which are not by nature compatible: the development of our teachers into a professionally competent and self-reliant group, and the development of an increasingly large and varied group of auxiliary experts, created on the assumption that teachers require more--not less--advice, direction, and even supervision and inspection. We are rapidly reaching the point

⁸"Watch This," Editorial, A.T.A. Magazine, Vol. 44, No. 9, (May, 1964), p. 5.

⁹C.L.Filmore, "School Administrators--Managers or Educators," The Nova Scotia Teacher, Vol. XL, No.5, June, 1964, pp. 6-8.

¹⁰Gerald Nason, "Teaching, A Professional Career," The Toronto Education Quarterly, Vol. III, No. IV, Summer, 1964.

where one of these two developments will have to prevail, with the other being phased down in a natural way until it reaches a level suitable to its supporting role. In plain words, either the officials and the system are going to be secondary and exist only to support the teaching, or the teaching is going to take second place to the system. I see no possibility of a lasting compromise between the two alternatives.

What is the answer to this dilemma? Is it the one which Nason himself advocates?¹¹

In other areas, such as curriculum, teacher training and certification, the entire responsibility should be assumed by the profession itself, subject only to the continuing approval of the authorities who represent the public and to the guidance of the policies which they enunciate.

There are those who would disagree. A visiting Australian educator has this to say:¹²

The growth and influence of teachers' associations in professional matters tends in some measure to limit individual initiative and the framework within which it can be exercised. In a sense, control of some matters has merely passed from one oligarchy to another.

He offers an alternative:¹³

It is true that society has the right to apply some prudential controls through its elected or appointed authorities. There is an obligation, however, to review constantly the structural controls which tend to accumulate and which are not adapted to particular circumstances. Sometimes it may be necessary to take a calculated risk and err on the side of professional freedom in order to give structural leeway for individual initiative.

Before returning to the more directly legal aspects of academic freedom, some reference to the classical concept of the bureaucracy may

¹¹Ibid., p. 6.

¹²W.D.Neal, "Centralization and Decentralization," The Canadian Administrator, Vol. III, No.8, (May, 1964), p. 32.

¹³Ibid., p. 34.

be of value. One of the characteristics of a bureaucracy is that it provides for the utilization of expertise and technical qualification. This expertise allows a measure of independence to the practitioner. This independence, which is founded in qualifications, is bolstered if the teacher enjoys security of tenure. As Blau has indicated, insecurity generates rigidity and resistance to change.¹⁴

Officials who feel secure in their ability to handle their responsibilities and do not continually worry about the reactions of superiors, conceive new problems as stimulating challenges, and welcome frequent changes which prevent their jobs from becoming monotonous.¹⁵

This statement concerns business and civil service bureaucracies, but Blau adds in a footnote that "this situation probably holds also for teachers and other professions." There are implications for the administrative staff here. If they tend to evaluate performance in terms of strict adherence to the rules and procedures, Blau states that the consequence is likely to be that

. . . employees are motivated, as a way of adapting to this situation, to think of bureaucratic procedures as if they were sacred ritual, and strong resistance to change in these procedures must be expected. When employees, on the other hand, are evaluated in terms of results accomplished in their operations, they are encouraged to exercise ingenuity and employ diverse methods in the interest of maximising specified accomplishments.¹⁶

While it is interesting to speculate upon the implications which bureaucratic procedures may have for the exercise of academic freedom, one is on surer ground in attributing pressures upon academic freedom to

¹⁴Peter M. Blau, Bureaucracy in Modern Society (New York: Random House, 1956), p. 2.

¹⁵Ibid., p. 91.

¹⁶Ibid., p. 90.

other sources. A novel suggestion by Margaret Gillet is of particular significance in a study of this nature. Commenting upon the United States Supreme Court's attempts to define academic freedom in a number of recent cases,¹⁷ she notes that the American Association of University Professors was reluctant to see academic freedom defined as a legal concept. This is because of the fear that "what the courts give, they may take away, and that having thus given and taken away, academic freedom may be left in a weaker position than it was before it became a concern of the law."¹⁸ In a concluding paragraph, Miss Gillett makes the following summary of the threat to academic freedom in the United States:¹⁹

Yet while the Federal Government appears as a somewhat incipient threat, and the United States Supreme Court too, State governments have committed overt acts of aggression against the autonomy of institutions of higher learning and the liberty of teachers. But perhaps more frightening even than this is the fact that infringements of freedom have come from within the academic community itself--from boards of trustees, from administrators, and even from faculty members.

Returning to the Canadian scene, a problem which has not yet reached the courts but which has the potential to do so is that of selection and assignment of readings in English Literature classes. The legal position of the teacher is not at all clear, in the event he assigns for outside reading a book which for one reason or another is

¹⁷Slochower v. Board of Higher Education of the City of New York; and Sweeney v. New Hampshire, quoted in Margaret Gillett "The Anatomy of Academic Freedom in the United States, 1959-60," The C.A.U.T. Bulletin, Vol. 10, No. 5 (May, 1962), p. 10.

¹⁸Gillett, loc.cit.

¹⁹Ibid., p. 14.

offensive either to the pupils themselves or to substantial and influential segments of the public. With the increasing availability of controversial books along with changing attitudes towards the reading habits of the high school student, it may very well be that a test case to establish the legal position of the teacher in this matter is in the offing.

In sum, it would appear that insofar as academic freedom is a concern of the law at all, it is primarily a matter of common law. While it would be quite possible to restrict academic freedom through legislation, it is doubtful if any legislation would create academic freedom. There are even those who prefer that it not be defined as a legal concept by the courts lest in the process something of its essence be lost.

Perhaps the best approach would be to assume that academic freedom exists without question, and to teach accordingly. It is quite possible that the area of freedom would expand if its edges were vigorously probed.

III. POLITICAL AND CIVIL RIGHTS

In the area of political and civil rights, there is more material to call upon than in that of academic freedom, although even here the issue does not appear to assume major proportions. Edwards comments thus:²⁰

²⁰Edwards, op.cit., p. 490.

The limitations placed on teachers and superintendents in expressing their political opinions while performing their official duties and the extent to which they may actively engage in politics are matters with regard to which there is not a great deal of judicial authority.

Statutory Provisions

There are a few specific prescriptions in the statutes regarding the matter of a teacher holding public office. In general, teachers are not permitted to be members of the school boards by which they are employed. The Public Schools Act of Manitoba is unequivocal. It reads:²¹

No teacher shall be a trustee of the district in which he is a teacher.

In Alberta the restriction is more general. With the exception of the local three man board of trustees in a rural area,²²

. . . no teacher under contract to a board may hold the office of trustee in any district or division.

Similarly in Prince Edward Island,²³

No teacher, while employed as such, shall be a trustee.

In Alberta the above provision has further implications for the right of teachers to hold public office in that County Councils, under The County Act, have responsibility for conducting school affairs of the County. This responsibility is shouldered by a committee of the council to which outside members may be appointed. Although there

²¹R.S.M. 1954, c.215, s.284 (2).

²²The School Act, R.S.A. 1955, c.297, s.87 (1).

²³The School Act, R.S.P.E.I. 1951, c.145, s.43 (1).

seems not to have been a test case as yet, the prevailing practice is for teachers not to sit on County Councils because of the connection with school business.

In the matter of holding other public office, statutory provisions appear generally to be lacking. Teachers sit on town councils and are members of provincial legislatures, especially in Western Canada. A problem arises in the matter of finding substitute teachers during sessions of the legislature. In a Saskatchewan Board of Conciliation case,²⁴ the Board upheld the teacher's right to sit in the legislature of the province. The school board had dismissed the teacher on the grounds that his absence from the school during legislative sessions was an inconvenience to the school board and the community. Because the Conciliation Board, established under The Teacher Tenure Act, did not have binding authority, the school board refused to accept its recommendation and the dismissal stood. An interesting sequel illustrates the 'persuasive' influence of the Saskatchewan Teachers' Federation. When it became known that the teacher had been dismissed, despite the Conciliation Board's recommendation, the school board was unable to find a replacement for him, and as a consequence, re-engaged the teacher they had dismissed. The teacher continued to sit in the legislature as well.

Teacher Organization Policy Statement

A policy resolution of the Alberta Teachers' Association, passed

²⁴Interview with a Staff Officer, Saskatchewan Teachers' Federation.

in 1939, and reaffirmed repeatedly since then, states the Association's position. It is reproduced here in full.²⁵

Whereas we must guard against our educational system becoming part of a political machine, which might either retard or undo the work of the Association, and
 Whereas: this Association views with concern the action of school boards attempting to restrict the academic freedom of teachers, and
 Whereas; the right of teachers to participate in political contests is a fundamental principle of democracy, and
 Whereas; this principle ought to entail assurance of security of tenure and seniority of position,
Be it resolved, that the Alberta Teachers' Association request the Government of the Province of Alberta to pass legislation whereby school boards might be prevented from discriminating against teachers who take part in politics or are elected to the provincial legislature, the House of Commons, or any other governing body, such legislation also to include permission for leave of absence for campaign purposes.

A statement of policy by the Canadian Association of University Teachers goes even further, suggesting leave of absence with full pay for campaign periods of up to six weeks.²⁶

It is clear from the above statements that while there is no legislation prohibiting teacher participation in public affairs, excepting the provision against being a member of the school board by which one is employed, the lack of positive legislation declaring such right to exist is deplored. It must be inferred from this that the existence of this right is not generally assumed, at least not by those responsible for the above statements. It is a moot point as to whether the teacher's position would be enhanced by his being singled out as

²⁵The A.T.A. Policy Handbook, 1963, p. 13.

²⁶"Academics in Politics," The C.A.U.T. Bulletin, Vol. 10, No. 5, (May, 1962), p. 31.

possessing, through statutory provision, the rights which, by virtue of his being a citizen in a democracy, should already be his.

Restriction of Civil Rights

In the area of civil rights, one finds a broad and not too clearly defined field. For the most part the teacher, whether at the university or in the school classroom, does not surrender civil rights by becoming a teacher. By the same token he does not surrender responsibility. The two are inseparable. As MacIver says:²⁷

The proper distinction between liberty and licence--a distinction so often misused--is that liberty passes over to licence when the responsibility attached is rejected.

In Goldsmith v. Board of Education,²⁸ a teacher was found guilty of unprofessional conduct in advocating in one of his classes the election of a particular candidate for the position of county superintendent of schools. In handing down his judgment, Hart, J., remarked:

It is to be observed that the advocacy before the scholars of a public school by a teacher of the election of a particular candidate for a public office--the attempt thus to influence support of such candidate by the pupils and through them by their parents--introduces into the school questions wholly foreign to its purposes and objects; that such conduct can have no other effect than to stir up strife among the students over a contest for a political office, and the result of this would inevitably be to disrupt the required discipline of a public school. Such conduct certainly is in contravention not only of the spirit of the laws governing the public education system, but of that essential policy according to which the public school system should be maintained in order that it may subserve in the highest degree.

²⁷MacIver, op.cit., p. 223.

²⁸66 Cal. App. 157, 225 P. 783 (1924).

On the other hand, an American school superintendent who was discharged for engaging in political activity to secure the election of particular candidates to the school board, was reinstated by the Supreme Court of Arkansas. It was the opinion of the court that the superintendent had been open and above-board in his behavior, had not been disrespectful in his criticism of incumbent board members, and that he had behaved in a moderate and responsible fashion.

It was not contended that the schools' interests were injured, or that the efficiency in the school work in that district was lessened.²⁹

A recent case, discussed in Chapter VII, is relevant to a discussion of civil rights for teachers. In California's Jack Owens case, in defining the term "unprofessional conduct" it was found that barring disruption or impairment of discipline or the teaching process, the term may not be applied to public criticism, by teachers, of the educational system of which they are a part. As indicated earlier, Owens' supporters claimed that the judgment "granted teachers the protection of the First Amendment (concerning freedom of speech) in circumstances where they had previously been completely vulnerable."³⁰ It was also pointed out, however, that such claims appear to be rather optimistic.³¹

²⁹Gardner v. North Little Rock Special School District, 161 Ark. 466, 257 S.W. 73 (1923).

³⁰Charles Tyner, "California's Jack Owens Case," Phi Delta Kappan, Vol. XLV, No. 6, (March, 1964), p. 276.

³¹Supra, p. 230.

In a Canadian case,³² a Winnipeg public school teacher was taking some visiting American college students on a tour of places of interest in Winnipeg, and he included a visit to the Communist Party headquarters on the itinerary. Considerable public furore, including questions in the House of Commons, ensued when a member of the Winnipeg School Board moved that a scholarship which had just been awarded to the teacher in question be withdrawn. The motion was defeated by a wide margin, but the fact that it was made at all is an indication that civil liberties are not inviolable.

Instances of the type given above indicate that civil liberties are not to be taken for granted, despite the fact that breach of such liberties rarely becomes a public issue in Canada.

In the United States, the preservation of civil liberties of teachers appears to be a more pressing matter. In 1949, the New York State Legislature passed the Feinberg Law which requires that any teacher belonging to any subversive organization be removed from office. A State Board of Regents is required to make a listing of such organizations, and membership in same is prima facie evidence of disqualification. This law was upheld by the Supreme Court of the United States in March, 1952.³³

In Beilan v. Board of Education, the defendant's refusal to answer questions about his political beliefs constituted incompetency

³²The C.A.U.T. Bulletin, Vol. 12, No. 4 (April, 1964), p. 38.

³³N.E.A. Journal, 41, 323, September 1952.

and was ground for removal under Pennsylvania tenure statute.³⁴ It may be, however, that in the long run, the significance of this case will hinge on the dissenting opinion of Douglas, J., which emphasized that reasons for dismissal should be tied closely to classroom performance. "A teacher," said Douglas, "who is organizing a Communist cell in a schoolhouse . . . would plainly be unfit for his job." In Adler v. Board of Education of New York,³⁵ the same Justice Douglas had declared,

The guilt of the teacher should turn on overt acts. So long as she is a law abiding citizen, so long as her performance within the public school system meets professional standards, her private life, her political philosophy, her social creed should not be the cause of reprisals against her.

In summarizing four major cases before the Supreme Court of the United States in the 1950's, the Harvard Law Review notes that a common thread running through these judgments is that the act charged must bear some relation to job fitness.³⁶

IV. SUMMARY

The foregoing is a brief outline of the problems of teachers at both the school and university level, in the vague and ill-defined areas of academic freedom, civil liberties and political rights.

A more exhaustive account would involve detailed study of reasons for dismissal of teachers, which in turn would involve the examination

³⁴357 U.S. 399 (1958).

³⁵342 U.S. 485 (1952).

³⁶"The Supreme Court: 1957 Term," Harvard Law Review, 72, 77, 188. April, 1958.

of large numbers of board of reference and domestic tribunal findings. It would also call for a closer look at the impact which mass education and all the apparatus of bureaucracy has or may have upon both the teacher's ability to practise his profession with integrity and independence, and indeed upon his inclination to exercise the freedom which the law and the courts already accord to him. Such an approach lies beyond the scope of the present study. The intention here has been to raise some of the major issues, define some of the chief concepts, and touch upon a few outstanding instances where the professional, political, and civil freedom and independence of the teacher have been attacked and defended.

From what has been discovered in this study, there appears to be every reason to support Underhill's assertion that the best way to defend academic freedom is to exercise it. This would seem to be equally true of political and civil rights. There are very few statutory provisions in Canada which distinguish the teacher from any other citizen, professional or otherwise, in the full exercise of such rights.

In Canada, the courts have not been called upon to adjudicate disputes in the area of academic freedom and civil rights. The general principles which appear to be emerging from the American scene are:

- 1) the court is not disposed to prohibit criticism by teachers of the administration of education even where this constitutes public criticism of employers, provided it is done in a responsible and reasonable fashion;
- 2) the court will countenance active participation by teachers, even in school board politics, provided such participation is not seen to

undermine discipline and the teaching process;

3) while the court will prohibit political proselytizing in the classroom, recent Supreme Court judgments tend toward the opinion that the act charged must bear some relation to job fitness.

This is a departure from bygone days, as illustrated by the following rules laid down by a New York City school principal in 1872:³⁷

- 1) Any teacher who smokes, uses liquor in any form, frequents pool or public halls, or gets shaved in a barber shop, will give good reason to suspect his worth, intentions, integrity and honesty.
- 2) Women teachers who marry or engage in unseemly conduct will be dismissed.
- 3) Men teachers may take one evening a week for courting purposes, or two evenings if they go to church regularly.

³⁷"Good Old Days," The School Board Newsletter (Published by the Nova Scotia School Board Association.)

CHAPTER X

CONCLUSIONS, IMPLICATIONS, AND RECOMMENDATIONS

I. INTRODUCTION

In assessing the legal status of a person, a class of persons, or an organization, one must examine the many sources from which legal status may flow. The present study has been concerned with the legal status of the Canadian teacher. By legal status is meant the particular standing in relation to the law which a person holds because he is a teacher. It has been shown that this status is derived from the common law, the statutes, from subordinate legislation, from judicial interpretation of both the constitution and the statutes, from quasi-judicial procedure, and from the exercise of legal powers possessed by teacher organizations.

Legislation Affecting all Provinces

With a few significant exceptions, the statutes referred to are provincial in origin. The exceptions include the British North America Act, Section 93, which assigns the responsibility for the education of Canadians to the provinces. Federal legislation also flows from the Federal Government's involvement in the education of Indians, Eskimos, servicemen and their children, immigrants, inmates of penitentiaries, and particularly from major participation in vocational and technical education. A third area of federal legislation which has implications for the legal status of the Canadian teacher is the Criminal Code of Canada. A number

of items in the Code are pertinent, but the most significant is section 63, a clause which recognizes the teacher's authority to use reasonable force as a means of correcting pupil behavior in the schools.

Provincial Legislation

Because of the provisions of section 93 of the British North America Act, great significance attaches to the provincial statutes which pertain to education. The legal status of the teacher is influenced particularly by provisions in school acts and education acts assigning to the minister the power to make regulations concerning teachers. These regulations may govern certification procedures, conditions of appointment, duties of teachers and a host of other related matters. Similarly the powers granted to school boards, giving them authority to operate schools, are of vital concern to the teacher. These powers include the right to appoint and dismiss teachers, and also the power to make regulations affecting the conditions under which teachers practise their profession. It has already been established that by-laws, regulations, and rules may have the force of law provided they do not contravene the statute from which they issue.

The legislation which incorporates teacher organizations is, of course, of crucial significance to the teacher's legal status. Its cruciality is apparent when it is recalled that teaching profession acts in some provinces provide for compulsory statutory membership in the organization, compulsory deduction of fees, while at the same time giving legal standing to codes of ethics, a breach of which may and sometimes

does lead to cancellation of the offender's teaching certificate.

Quasi-judicial Procedures

One of the major considerations of this study has been the role and function of the administrative and quasi-judicial tribunals which provincial statutes have established in most provinces to deal with problems arising between teachers and authorities with whom they deal. These tribunals fall into three sub-divisions, each of which is associated with a particular set of relationships involving teachers. Conciliation and arbitration boards are associated with collective bargaining, and the statute under which such bargaining is carried on; boards of reference are established to deal with alleged breaches of tenure legislation; while discipline or professional committees, sometimes referred to as domestic tribunals, are set up to deal with alleged breaches of the teachers' code of ethics. It should be remembered that these tribunals function, not as administrative agencies of the department of government which administers the act concerned, but rather as an agency whose function it is to adjudicate objectively and independently, alleged breaches of the act by the parties concerned. By the same token a discipline committee functions, not as instrument of the executive of the teacher organization, but rather as the means whereby the membership undertakes to provide fair adjudication of alleged violation of their code of ethics.

In the area of collective bargaining, two types of board may function. The one is a conciliation board which does not act judicially but rather in a mediating role. It has no decision-making authority

whatever. Only by advance agreement by both parties can the recommendations of a conciliation board have binding effect. On the other hand, in instances where arbitration boards function, the power they exercise is a judicial one, with decisions binding upon both parties. As a rule conciliation and mediation apply in the negotiation of an agreement, while arbitration applies to breaches in the observation of the agreement. In two provinces, compulsory arbitration applies in the event of deadlock in negotiation procedures.

Tenure legislation in Canada includes provision for a board of reference, a procedure whereby alleged breaches of tenure legislation are adjudicated. In many instances, the findings of such boards of reference are binding.

A third area in which the quasi-judicial procedure operates is in adjudicating alleged breaches of the code of ethics. The discipline or professional committees of teachers' professional organizations are domestic tribunals exercising legally constituted powers over individual teachers.

These tribunals, all functioning in quasi-judicial fashion, do a substantial volume of work which would otherwise either fall to the courts or be left undone.

The Courts

The existence of quasi-judicial adjudication does not mean that the role of the courts has by any means become insignificant insofar as the teacher is concerned. In addition to dealing directly with cases

involving liability, disciplining of children, academic freedom, and a wide miscellany of matters, the courts have a supervisory function insofar as the quasi-judicial bodies are concerned. While the courts usually do not rule on questions of fact in appeals from tribunal decisions, they are sometimes called upon to rule in matters of law, particularly to determine whether or not jurisdiction has been exceeded, and also to decide whether or not the proceedings of the tribunal have been such as to afford the appellant a fair hearing.

On the basis of the legal framework outlined above, the legal status of the Canadian teacher has been assessed. There follows a brief summary of the findings arrived at.

II. REVIEW OF FINDINGS

Certification, Appointment and Transfer

Primary authority for certification, appointment, and transfer of teachers lies in the statutes. The court's function is one of interpretation.

Certification. Teachers are certified by boards or committees, operating under the authority of the Minister. While teacher representation on such committees is common, their influence is by no means controlling.

Certification authorities perform a discretionary duty and the courts are not disposed to interfere unless it is clear that discretion has been abused. A certifying authority cannot refuse to issue a certificate without good cause.

Courts have ruled that a certificate is not a contract but a privilege; nevertheless possession of a certificate is a condition of employment. Lack of certification is a bar to recovery for services rendered under quantum meruit.

While court findings are not conclusive on the matter, general practice in Canada is that certification must be in effect at the time employment actually begins.

Generally a teacher is defined in the statutes as one who possesses a valid certificate of qualification. The courts have held that a teacher is not a public officer, but has a master-servant relationship with the employing school board. This relationship has implications both for tenure and liability.

Appointment. Procedures to be followed in appointing teachers are laid down in the statutes. The courts have held that where such provisions are imperative, compliance is also imperative. Courts have exercised discretion, however, where compliance has been found to be substantial.

It has been held that provisions of the statutes constitute part of the contract, whether this is implied on the face of the contract or not; also, that clauses which are at variance with the provisions of the governing statute are ineffective.

Transfer of teachers. In general, school boards are authorized by statutes to transfer teachers at will. The courts have supported this provision provided there is no clear evidence of either caprice, malice, or unreasonableness attached to such action. It has been held

that a major demotion constitutes dismissal, a finding which brings tenure provisions into play. A transferred teacher must not suffer a decrease in salary during the year in which a transfer has been effected.

Summary. Recourse to the courts in matters of certification, appointment and transfer appears increasingly rare in Canada. This may be attributed to the work of quasi-judicial bodies in relieving the courts of some of their burden; to the fact that collective bargaining procedures have removed many sources of dispute between teachers and boards from the area of individual lawsuit; but perhaps even more to the tendency of both school boards and teachers, as they become more organization conscious, to avoid open confrontation in the courts. Concern for the public image of the organization, along with a dawning realization that most litigation can be avoided, influences organization leaders to seek ways and means of settling their differences more informally, and by procedures which come less readily under the public gaze.

Collective Bargaining

Collective bargaining is practised by the overwhelming majority of Canadian teachers, whether under statute or informally. Some American educators question the propriety of collective bargaining and prefer to speak of professional negotiation.

In the provinces where collective bargaining is statutory, provision is made for the settlement of disputes through conciliation, mediation, or arbitration. Conciliation is a formal procedure which is

essentially an extension of negotiation. Arbitration is also a formal procedure, but with an adjudicatory function. Mediation is generally informal, but inasmuch as it is often backed up by the power and prestige of government, it is often very efficacious.

Arbitration sometimes is applied to break a deadlock in negotiation of an agreement, and is always available for settlement of a contract observance dispute.

The strike is legal in one province, specifically prohibited in others. In no instance is a contract observance dispute permitted to issue in a work stoppage.

The basic principle underlying collective bargaining is one of collective or group action on the part of representatives to achieve a common goal, based on the understanding that action shall be in accordance with mutually agreed upon procedures, with provision made for third party conciliation, mediation, or arbitration in the event of break-down of negotiations.

In general, Canadian teachers bargain collectively for salaries, sickness and accident benefits, leave of absence provisions, regulations governing conditions of work, etc. They tend to eschew the American approach which is to concentrate upon having minimum salary scales, standards of working conditions, definition of job category, etc., written into the statutes.

A court has ruled that, inasmuch as no adjudicating function attaches, a teacher may sit as a member of a conciliation board.

Arbitration boards, armed with considerable legal powers, and

having an adjudicating function, must be seen to be completely impartial. Awards have been set aside by the courts in instances where impartiality has been successfully called into question.

In provinces where collective bargaining legislation does not apply to teachers, varying effective informal procedures have been developed for settling disputes. These include rating of boards by teachers' organizations, the use of the "grey" or "pink" letter, and occasionally entry into an open political trial of strength in a community between the teacher organization and the school board.

While court decisions respecting collective bargaining are rare in Canada, a recent judgment handed down by the British Columbia Supreme Court is significant inasmuch as it attempts to place limitations upon the class and nature of items which may be subject to collective bargaining procedures. As in other instances, the significance of such a finding is directly related to the wording of the particular legislation it seeks to interpret.

The place of the individual teacher in the midst of this collective bargaining apparatus is not completely lost. He may vote in the selection of his negotiating team and has the right to present a grievance if he feels his contract is not being observed.

It has been asserted that good faith bargaining, in addition to contributing to the realization of a mutually acceptable collective agreement, is also "one of the best methods of keeping the school personnel realistically informed about vital problems concerning the operation and administration of schools."

Finally, and in keeping with the major hypothesis of this study, recourse to collective bargaining procedures has resulted in a diminution of judicial participation in the solution of disputes concerning the economic welfare of teachers.

Tenure Legislation

Tenure legislation is provision by statute for the protection of teachers against arbitrary dismissal upon unreasonable, capricious, or malicious grounds. While not a bar to dismissal, it establishes procedures whereby dismissal of teachers may properly be carried out. It establishes procedural rights of due notice, statement of charges, and assurance of a fair hearing to those to whom its provisions apply. Such a hearing is conducted by a board of reference, a quasi-judicial tripartite body, clothed with extensive legal powers.

Generally there are three steps involved in an alleged breach of tenure case. First, a teacher applies, usually through his professional organization, for a board of reference hearing. Next, the organization conducts an informal investigation to determine if the application warrants official support. Thirdly, and in the event official support is forthcoming, the Minister orders a formal hearing. It should be noted that in some provinces, the Minister has the authority even at this stage to grant or to refuse to grant a board of reference.

Tenure legislation in Canada conforms generally to the criteria presented in this study. Present concern lies, not so much with the formal proceedings, as with the evident inclination of both teacher

organizations and school boards to settle "out of court." Such settlements, while acceptable to the organizations, and often to the teacher and community involved, may result in either one of two equally undesirable consequences. The informal investigation is not in the nature of a proper hearing and a decision to extend or withhold organizational support may be based upon inadequate or unreliable information. Since few applications for a hearing are granted in the absence of organizational support, the possibility of the teacher's rights being abridged are ever present. By the same token, informal discussions may lead the school board to retain the services of a teacher, when a more complete and proper investigation might reveal the teacher to be in fact incompetent or unfit for further teaching service.

In order to avoid either of the above outcomes, it is essential that preliminary and informal enquiries be investigatory or mediating only. Any adjudicating function must be left to bodies clothed with power to act judicially. Evidence gathered with regard to current practice in many Canadian provinces is by no means reassuring in this respect.

Litigation regarding tenure is not at all extensive in Canada, but where it has arisen, it has been demonstrated that the courts reserve to themselves the right to review matters of law and procedure, while generally leaving the interpretation of matters of fact to the tribunals set up to examine them. A case heard in a province without tenure legislation leads to the suggestion that such a deficiency can be detrimental to the interests of the teacher.

Professional Conduct

As professional bodies, all teacher organizations in Canada subscribe to a code of ethics. The purpose of a code of ethics is to reduce to point form a standard of professional conduct. In keeping with practice followed in the professions of law, medicine, engineering and many others, teacher organizations have established tribunals for adjudicating charges of breach of code of ethics provisions by members of the organization.

A properly established domestic tribunal has clearly laid down procedures for appointing the members, conducting a preliminary inquiry, laying a charge, and holding a hearing. Authorities agree that great care should be taken to avoid overlapping in the investigatory and adjudicating function. Those who have a say in deciding whether or not there is to be a hearing, should not participate if a hearing ensues. The procedure for conducting a hearing must be such as to afford the accused "natural justice" as the term is used in this study. It should also provide for appeal. In some teacher organizations in Canada, the disciplinary machinery meets these criteria, in others it does not. The wide variation in machinery as established at the present time is to be deplored. Steps need to be taken to achieve such a degree of uniformity of practice as to assure a fair measure of justice to Canadian teachers wherever they may be.

Although the term "domestic tribunal" is commonly applied to a discipline committee, the fact that teacher organization tribunals have jurisdiction over matters in which there is a public interest, renders

the term "domestic" rather inaccurate. In this respect they are similar to the disciplinary bodies of the legal and medical professions, inasmuch as one of their functions is to protect their clients, in this case the public, from the consequences of professional misconduct.

Data on the activity of discipline committee activities are not as comprehensive as could be desired, but data that are available suggest that as in the case of tenure provisions, teacher organizations tend to prefer informal solutions to discipline problems. The fact that some forty-five hearings were held in a single year indicates, however, that formal proceedings are by no means a rarity. The additional fact that a goodly number of these hearings resulted in suspension or cancellation of teaching certificates emphasizes the importance of seeing to it that a fair hearing is held.

Teacher-Pupil Relationships

For the most part the legal relationships between teacher and pupil are of common law origin. While the statutes may require that the teacher exercise care and control over his pupils, the common law concepts of "careful father," "standard of care," "the safe place" and in loco parentis provide the basis for assessing both responsibility and authority in the proper exercise of these functions.

Negligence in the care of pupils may result in liability for damages. Teacher liability may be mitigated if not eliminated by the master-servant relationship which tends to transfer liability to the school board, provided the teacher has not acted beyond the scope of

his authority. It should be noted that liability can only ensue, if negligence has resulted in harm or damage to the pupil

The control of pupils requires the exercise of authority. Because of the inherent complexity of the school situation, it is virtually impossible to prescribe in advance procedures to be followed in the event of misbehavior. This being so, the common law concept in loco parentis recognizes the right of the teacher to exercise his own judgment in coping with the situation. If the teacher decides that corporal punishment is necessary, the court is not disposed to substitute its own judgment for that of the teacher in arriving at its decision. Its primary concern is that the punishment, if applied, be "reasonable under the circumstances," and not a consequence of malice or caprice.

The court also recognizes that pupil responsibility for civil deportment and obedience to lawful commands constitutes the common law of the school. It regards suspension from school as a legitimate means of dealing with pupils who refuse to be guided by the common law position.

In view of the fact that as yet there has been no move to establish quasi-judicial tribunals to deal with matters of pupil discipline, there seems little likelihood that recourse to the courts for adjudication of such matters will be eliminated in the foreseeable future. In the meantime, if the teachers and the pupils, and through them the parents, acquaint themselves with their rights and responsibilities in this regard, the need for formal adjudication will be kept to a minimum.

Academic Freedom, Political Rights, and Civil Liberties

While issues concerning academic freedom, political rights, and civil liberties of teachers have not been to the fore on many occasions in Canada, a few instances here, along with a more general concern with the problem in the United States, indicate that such rights and freedoms are not to be taken for granted. On the other hand, there is little in legislation or court findings which either restricts the exercise of such rights by teachers, or suggests that the teacher differs substantially from other citizens, especially in the area of civil and political rights. The teacher's special position in relation to children requires that the exercise of his rights be tempered with responsibility, lest liberty become licence. Provided he does not reject this responsibility there seems to be no bar either from the law or the courts to the enjoyment of the full rights of citizenship. If there is a threat to the full exercise of academic freedom it may well be that it comes from loss of individuality of the teacher in the apparatus of mass education, and from his apathy and apparent disinclination to assert the professional independence which a broad education and an effective training program equip him to enjoy.

III. CONCLUSIONS

Concerning Quasi-judicial Processes

The major hypothesis presented at the beginning of this study was to the effect that while the legal status of the Canadian teacher is still founded in legislation and court findings, increasingly it is

being shaped and influenced by the work of quasi-judicial bodies established pursuant to special legislation. To what extent has this hypothesis been supported?

There seems little doubt that in the body of relationships with the law which flow from the teacher's special status as a teacher, large segments of these relationships fall within the orbit of quasi-judicial surveillance.

The whole area of salary negotiation, conditions of employment, and in general, all aspects of the economic welfare of teachers, are subject to the collective bargaining procedure. In the event that the services of a third party are needed to conciliate, mediate or adjudicate, it is not the courts to which disputing parties turn, but to lesser tribunals, established by legislation to perform this special function.

There are few either inside the profession or out, who would not consider the question of job security as of crucial significance both to teachers and to the school boards by which they are employed. Legislation has provided for a measure of security of tenure by establishing orderly procedures for dismissal of teachers. If these procedures are circumvented, the services of a board of reference may be called upon. When it is considered that such a board may, on the basis of its findings, require a school board to reverse its action and reinstate the teacher whom it has dismissed, there can be little doubt once again that a significant judicial function is being exercised outside the courts.

The provisions of teacher organization codes of ethics touch upon so many aspects of the teachers' professional life and activities that

any authoritative procedure for dealing with breaches of the codes can have vital significance for the teachers' legal status. Domestic tribunals have been established through legislation, and, in a number of instances, possess substantial legal authority, both for carrying on judicial proceedings, and for recommending corrective measures. The fact that each year significant numbers of teachers have their teaching certificates either suspended or cancelled as a result of the findings of such tribunals, testifies to the power which they are able to wield. In addition, teaching profession acts in some of the provinces include provisions for statutory membership, which means that membership in the teacher organization is a condition of employment in any and every publicly operated school in the province. Annual fees are also deducted, by law.

In the light of the foregoing there seems to be every justification for saying that judicial procedures outside of the courts, along with the substantial legal power granted by the legislature to the teacher organization, profoundly affect the teachers' legal status. But is the effect as real as it is apparent? This would depend in part upon the extent to which the special procedures have been used.

In the first place, it is quite evident that litigation at the level of the courts has dwindled to a trickle as far as teachers on the Canadian scene are concerned. Publications of the National Education Association¹ and Garber's Yearbooks of School Law indicate that in the

¹The Teacher and the Law, School Law Series, Research Monograph 1959-M3, Research Division, N.E.A. (Washington, D.C., September, 1959).

United States disputes involving teachers continue to come before the courts in substantial numbers. Whether this is because there is less quasi-judicial machinery is not established but might be conjectured.

It is not to say, however, that because Canadian courts do not handle a large volume of teacher cases, that quasi-judicial tribunals are heavily burdened in this respect. Neither is it to say that the courts do not, even yet, exercise a vital and controlling influence. Except in the province of Quebec, where board of reference proceedings have only recently been inaugurated, a board of reference hearing is a relative rarity. Some teacher organization officials readily admit that their organizations will support an application for a board of reference only if they feel on the basis of a preliminary investigation that there is a better than even chance for the teacher to win the case. These admissions are supported by Swan's findings and by data gathered for this study. Both indicate that the number of instances, beginning with a complaint from a teacher of unjust dismissal, which culminate in a formal hearing, is relatively small. Similarly, in the area of professional conduct, there is a substantial fall-off between the number of complaints and the number of formal disciplinary proceedings. Collective bargaining procedures vary so widely that it is difficult to generalize with respect to arbitration, but even here it is apparent that while the potential for dispute is almost infinitely great, the number of conciliations, arbitrations, or work stoppages, appears to be relatively small.

These findings would seem to justify the conclusion that in

general, teacher organization officials prefer to deal as informally as possible with problems and disputes which involve their members. One may advance a number of reasons by way of explanation. Formal hearings take time, money, and staff resources. They also involve a more or less open confrontation, often between the teacher and his employer, sometimes between the teacher and his colleagues. To lose in an open confrontation means not only to lose the particular case, but also it may mean a loss of face to the organization. Trustee organizations and school boards are also wary of such confrontations and seem equally anxious on many occasions to settle out of court. Furthermore, once judicial proceedings are initiated, there is a certain inexorableness and inevitability about them which organization people in particular seem to find rather disturbing. When two parties negotiate informally, they remain in full control of proceedings and may govern their direction and even terminate them if they so desire. Once formal proceedings begin, however, this power of control is in large measure lost. On the other hand, the individual teacher is afforded a measure of protection by formal proceedings. He knows what is going on, when it is going on. If negotiations are sub rosa, he may be unaware of their nature. Those elements of openness, fairness, and impartiality which proper judicial and quasi-judicial tribunals are designed to guarantee, may seem to be in jeopardy.

There remains, of course, the fact that the mediating influence of a teacher association staff officer is usually quite sufficient to settle a dispute or problem amicably, and where this is so, formal

proceedings are neither necessary nor desirable. Also there are those instances which do issue in formal hearings. It is assumed that where this is the case, a measure of justice will be done. Our concern lies with those instances that fall between the two categories outlined above. If the work of the investigating officers is mediating only, or if it results in the holding of a formal hearing, the individual has nothing to lose and perhaps much to gain from the work of his organization. It is when the mediating and adjudicating functions become blurred that the danger of injustice arises. It is situations of this type which place the greatest demands upon the integrity of the staff officer. He has to be able always to see the rights of the individual teacher and also to be aware of the public interest which is involved. He has to remember that while a teacher organization is a mutual benefit society with a duty to serve its members, it is also a professional body with a responsibility to protect its clients. If through preliminary inquiry he has reason to feel that the rights of either member or client are being infringed, it is his duty not to adjudicate, but to recommend that the matter be brought before a duly constituted body empowered by statute to act judicially. No evidence has been found to support the suggestion that quasi-judicial tribunals, properly established and operated, in any way constrict or abridge the legal rights of teachers. It is only when such procedures are short-circuited that the ends of justice may be badly served. Informal proceedings, while taking on some of the trappings of a formal hearing, cannot give the assurance of that openness, fairness, and impartiality, which must be present if

justice is to be done. If legal short cuts are resorted to at the quasi-judicial level it is quite likely that the courts may also be denied their proper role. While legislation usually provides for appeal either to a tribunal of higher standing or to the courts from decisions of tribunals of the first instance, such review powers are unlikely to be exercised if the initial decision is an informal one.

A word must be said of the proper role of the courts in relation to special tribunals. The courts' function is generally to review the work of the lower tribunal, usually in matters of jurisdiction and other points of law. In other words, it attempts to determine whether in dispensing justice, the lower tribunal has observed the rules of justice and fair play. In all matters of law, the court is the final arbiter. In questions of fact, especially as they relate to professional matters, it is often asserted that the special tribunal is more competent. From the point of view of the trustee and teacher organization, there is the additional consideration that by virtue of the appointing procedure, they have a greater measure of control over the proceedings than when the issue goes before a court. By the same token, as was indicated earlier, the informal procedure is even more subject to internal control. Is it then that the attitudes, policies, and practices of the groups concerned in this entire question of adjudication of disputes, are centered on and influenced by considerations of power and control? While the evidence gathered does not justify a positive assertion to this effect, it is such as to justify the question's being asked.

In the event of a power struggle between contending parties, it

would seem that if one party is less powerful than the other, it will look to formal processes and to the law as a means of adjusting the balance. Conversely the more powerful party will prefer the flexibility that is a characteristic of the informal process. From the findings of this and other studies there seems little doubt that prior to the advent of teacher organizations, the teacher was the underdog in a confrontation with the trustees. To adjust this unfavorable balance, teachers organized. They sought and in many cases were granted tenure legislation and collective bargaining procedures. This machinery was put to the test. As Swan found, in Alberta there was a rush of Board of Reference hearings which tended in the main to find in favor of the teacher. Through organization and appeal to formal proceedings teachers reached the point where they were dealing with their employers on more or less equal terms. A decline in formal hearings occurred. Moreover, in more recent years the few hearings that have been held in Alberta have tended to favor the school board.

Working on the concept that the court is the interpreter rather than the creator of law, Dedrick assumed, and was able to substantiate the assumption, that the common law, as it concerns the teachers' contractual status, would be responsive to the social climate in which it operated, i.e. that the rules of law announced in the decisions would reflect any changing attitude of the population toward security of employment for teachers. It would appear that this same principle may be at work on the Canadian scene.

Concerning the Courts

The fact that quasi-judicial bodies and more informal processes have assumed much of the volume of work which might otherwise fall to the courts does not mean that the courts' influence on the legal status of the teacher is less vital or fundamental. At the level of the highest courts it is not the volume of cases which is significant, but the quality of the judgments and the extent of the jurisdiction which are significant. The Supreme Court of the United States has the power to set aside laws of Congress, and by its judgments may alter the social and cultural structure of America, and yet the number of cases which come before it in a given year is relatively small. Similarly while the Supreme Court of a province or of Canada may hear few cases concerning teachers, their power to set aside findings of lower courts and of quasi-judicial bodies makes their influence vital.

In addition to their supervisory function over lesser tribunals in matters of law, there are still areas in the teacher's professional activities over which the courts have direct jurisdiction. These include cases arising out of alleged liability for damages, those involving the exercise of disciplinary control over pupils, questions of certification and appointment of teachers, and, should cases arise, the area of the academic freedom and civil rights of teachers.

From the findings of this and other studies it is possible to set out a few general principles which guide the behavior of the courts as they adjudicate disputes involving teachers. Many of these principles have been arrived at by other investigators but are included here in

order to give a more complete picture of the teacher's legal status.

A few of these general principles are:

1) Where the statutes or common law have granted discretion to quasi-judicial bodies or to teachers, the courts are not disposed to substitute their own discretion.

2) The courts will reserve to themselves the right to review all questions of law and of jurisdiction, regardless of statutory provisions in the form of privative clauses.

3) If the provisions of the statute are imperative the courts will rule that compliance is also imperative, but they may exercise discretion if compliance has been substantial. The courts do not seem disposed to allow technical non-compliance to obstruct justice.

4) In the matter of dispute concerning the exercise of authority over pupils, the courts will judge the teacher's behavior in the light of what they deem to be behavior which is "reasonable under the circumstances."

5) In the matter of care for the physical well-being of students, the courts expect of the teacher the standard of care that might be expected of any reasonable person in a similar situation.

6) While lack of cases concerning academic freedom, civil liberties and political rights prohibits any generalization about the Canadian scene, there appears to be a tendency in the United States to judge teachers by their actions in the classroom, rather than by alleged affiliations outside the school.

IV. IMPLICATIONS

Implications for Teacher Organizations

There seems little doubt that teacher organizations in most provinces have become sufficiently powerful and well organized to exert major influence in matters which are of concern to teachers. Services to their membership include inservice education, workshops and seminars, collective bargaining, participation in boards of reference, publications both general and technical, credit union, group insurance, etc. Through legally established domestic tribunals they have power to discipline their members, to the point of exclusion from membership. They stand ready to give legal advice on all matters arising out of professional activities. A number of implications arise from this situation.

1) Having sought, and in the main achieved, tenure legislation, bargaining procedures, and domestic tribunals, teacher organizations have the obligation to see to it that these powers are utilized whenever, wherever, and for whatever reason individual members are in need of the protection which such procedures afford. With every accretion of power by the organization there is the likelihood that there may be some relative loss of influence on the part of the individual member. It is this paradox which fosters the idea that through organizing into a collectivity the individual teachers may have merely transferred control of their destinies from one oligarchy (viz - the trustees) to another (viz - their own organization). Surely it is in the interests of the organization that such a development not be seen as the chief consequence

of its efforts. If it is to avoid such a development and such an allegation, the teacher organization must encourage its membership to be active, critical, and independent. It must also strive to make the membership aware of the legal rights which are at their disposal, and eschew the theory that the best solution of individual or organizational problems is the one that causes the least ripple, or reflects most favorably on the image of the organization. This is not to say that those elected by the membership to leadership positions should abandon the functions of leadership. Nor is it to suggest that staff officers should become mere errand runners. If their functions are clearly defined there is ample scope for dignified and effective leadership to be exercised without any risk whatever to the rights which the law ascribes to the individual member.

Implications for Teachers

The evidence gathered from this and other studies suggests that there is substantial legal provision for the protection of teachers in the practice of their profession. This protection stems from the statutes, from the common law, from the disposition of the courts to support them during reasonable behavior in their relationships with pupils, and from the quasi-judicial machinery which is empowered to deal with problems in the area of economic welfare, of tenure, and of professional conduct. When these procedures are properly established and properly acted upon, the teacher has little to fear from their activities. The individual teacher's concern is with asserting the

freedom and the independence which the statutes accord him, and with securing the protection which quasi-judicial tribunals and the courts are empowered to give him. On the other hand, it should not be assumed that by availing of all the provisions for self assertion, and for protection, which the law provides, and by conforming to all the statutory provisions regarding his duties and responsibilities, that the individual teacher has done all that is required of him. In the final analysis, whatever legal status a teacher has, is his because of the position he occupies in the educational structure. If he wishes to be regarded as a professional person, he must so assert himself, even though such assertion may bring him into conflict with the public, his employers, or his peers. The professional person's first responsibility is to his clients, and any provision or condition, legal or otherwise, which interferes with the effective carrying out of that professional responsibility is to be viewed with concern.

It follows that if the individual teacher is to perform a professional function, then he must equip himself with a broad education and the specialized training which distinguish the professional from the amateur. In an era of mass education, of big government, the large school system, the large school, and powerful educational organizations, the individual teacher's chief asset lies in professional competence and the independence which such competence offers him.

Implications for Research

One of the major problems encountered during the course of the

present study was lack of data, and of research at the provincial level. Not enough is known of the nature and work of provincial teacher organizations. With few exceptions there is no organized knowledge of the working of quasi-judicial bodies, nor of their impact upon the educational scene.

Similarly, the nature and workings of trustee organizations need investigation and analysis. Most of all it is necessary to disseminate among interested parties the knowledge that is already available. When one considers that in the United States there is sufficient material on school law to justify the publication of a substantial volume each year, along with a great variety of individual studies, it becomes apparent that much remains to be done on the Canadian scene.

The present study has revealed the important place of the teacher organization in the legal status of the individual teacher. There would be merit in pursuing the matter of relationships generally between the individual and his professional organization. Much remains to be discovered about the nature of these relationships.

V. RECOMMENDATIONS

One of the most readily apparent facts which emerges from this study is lack of uniformity in the provisions, procedures and practices which constitute the legal status of the teacher. While there may be little merit in the principle of uniformity for its own sake, there is some virtue in having a measure of similarity in the legal provisions and practices from province to province. Just as it is desirable from

the teachers' point of view to have portability of pensions, so, in the interests of mobility and the convenience of the teacher who moves from one province to another, is it desirable for the teacher to enjoy substantially the same legal protection in one province as in another. In one of the provinces of Canada there is no tenure legislation, no provision for collective bargaining, no official provision for the disciplining of members, and a prohibition against teachers serving as school board members under any circumstances. In some provinces disciplinary procedures are spelled out in detail and sanctioned by the legislature, in others they are so informal as not to be committed to paper.

One of the recommendations of the Canadian Bar Association's committee on domestic tribunals was that there be a general Domestic Tribunals Act with amendments to each of the individual acts incorporating as much of the general act as is desirable. Before teachers could hope to be a party to such a development, steps would have to be taken to bring about some uniformity in the provisions which exist within the teaching profession. The chaos which exists as far as provision for quasi-judicial proceedings is concerned, might be excused if there were no communication between provincial organizations. With the present channels which exist for such communications to take place, there is no justification for the lack of integrated policies which obtains.

It would seem appropriate for the Canadian Teachers' Federation, in cooperation with La Corporation in Quebec, to initiate steps aimed at achieving at least a minimum level of judicial quality to the

proceeding where power to act judicially is exercised.

Steps could also be taken to make the membership of teacher organizations more aware of their rights and their responsibilities as far as the law is concerned. Litigation is expensive, time-consuming, and often the source of long term hostility between the disputing parties. There seems little doubt also that much needless litigation occurs as a result of ignorance of the law. Any contribution which teachers and teacher organizations can make to dispel such ignorance, both among teachers and among the general public, is to be applauded.

GLOSSARY OF LEGAL TERMS AND PHRASES

Audi alteram partem: Hear the other side, hear both sides. No man should be condemned unheard.

Certiorari: (To be informed of, to be made certain in regard to.)
The name of a writ of review or inquiry.

Ejius generis: Of the same kind, class, or nature.

Ex parte: On one side only.

In loco parentis: In the place of a parent.

L'etat, c'est moi: I am the state.

Lis inter partes: A dispute between parties.

Mandamus: (We command.) A writ commanding the performance of a particular act.

Nemo debet esse iudex in propria causa: No man ought to be a judge in his own cause.

Omnia praesumuntur rite esse acta: All things are presumed to be correctly done.

Prima facie: At first sight; on the face of it; a fact presumed to be true unless disproved by some evidence to the contrary.

Quantum meruit: As much as be deserved. It refers to a class of obligations imposed by law, without regard to intention or assent of parties bound, for reasons dictated by justice and reason.

Rex est lex loquens: The king is the law speaking.

Stare decisis: To abide by or adhere to, decided cases. Policy of courts to stand by precedent and not to disturb a settled point.

Ultra vires: Outside the law.

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Canadian

| <u>Abbreviation</u> | <u>Report</u> |
|---------------------|--------------------------------|
| Alta. L.R. | Alberta Law Reports |
| Alta. C.R. | Alberta Court of Appeals |
| B.C.R. | British Columbia Reports |
| B.C.S.C. | British Columbia Supreme Court |
| C.C.C. | Canadian Criminal Cases |
| D.L.R. | Dominion Law Reports |
| E.L.R. | Eastern Law Reporter |
| Man. R. | Manitoba Reports |
| M.P.R. | Maritime Provinces Reports |
| N.B.R. | New Brunswick Reports |
| N.B.C.A. | New Brunswick Court of Appeals |
| N.S.R. | Nova Scotia Reports |
| N.S.C.A. | Nova Scotia Court of Appeals |
| O.A.R. | Ontario Appeal Reports |
| O.L.R. | Ontario Law Reports |
| O.R. | Ontario Reports |
| O.W.N. | Ontario Weekly Notes |
| O.W.R. | Ontario Weekly Reports |
| Que. K.B. | Quebec King's Bench Reports |
| Que. S.C. | Quebec Superior Court Reports |

| | |
|------------|------------------------------|
| R.L. | Revue Legale |
| Sask. L.R. | Saskatchewan Law Reports |
| S.C.R. | Canada Supreme Court Reports |
| Terr. L.R. | Territorial Law Reports |
| U.C.C.P. | Upper Canada Common Pleas |
| U.C.Q.B. | Upper Canada Queen's Bench |
| W.L.R. | Western Law Reporter |
| W.W.R. | Western Weekly Reports |

British

| <u>Abbreviation</u> | <u>Report</u> |
|---------------------|--|
| A.C. | Law Reports, Appeal Cases, House of Lords, after 1890 |
| App.Cas. | Law Reports, Appeal Cases, House of Lords, 1875-1890 |
| Cr. & J. | Crompton and Jervis Exchequer Reports |
| E.R. | English Reports |
| K.B. | King's Bench Reports |
| Q.B. | Queen's Bench Reports |
| T.L.R. | Times Law Reports |
| Ex. | Exchequer Reports |

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